

File
26018

Original

No. ~~8587~~ and No. 8588.

In the Supreme Court

of the

State of California.

CHARLES LUX et al.,

Appellants,

vs.

JAMES B. HAGGIN et al.,

Respondents.

Brief for Respondent.

Louis C. Haggin,

Attorney for Respondent.

Garber, Thornton & Bishop,

Flournoy, Mhoon & Flournoy,

Of Counsel.

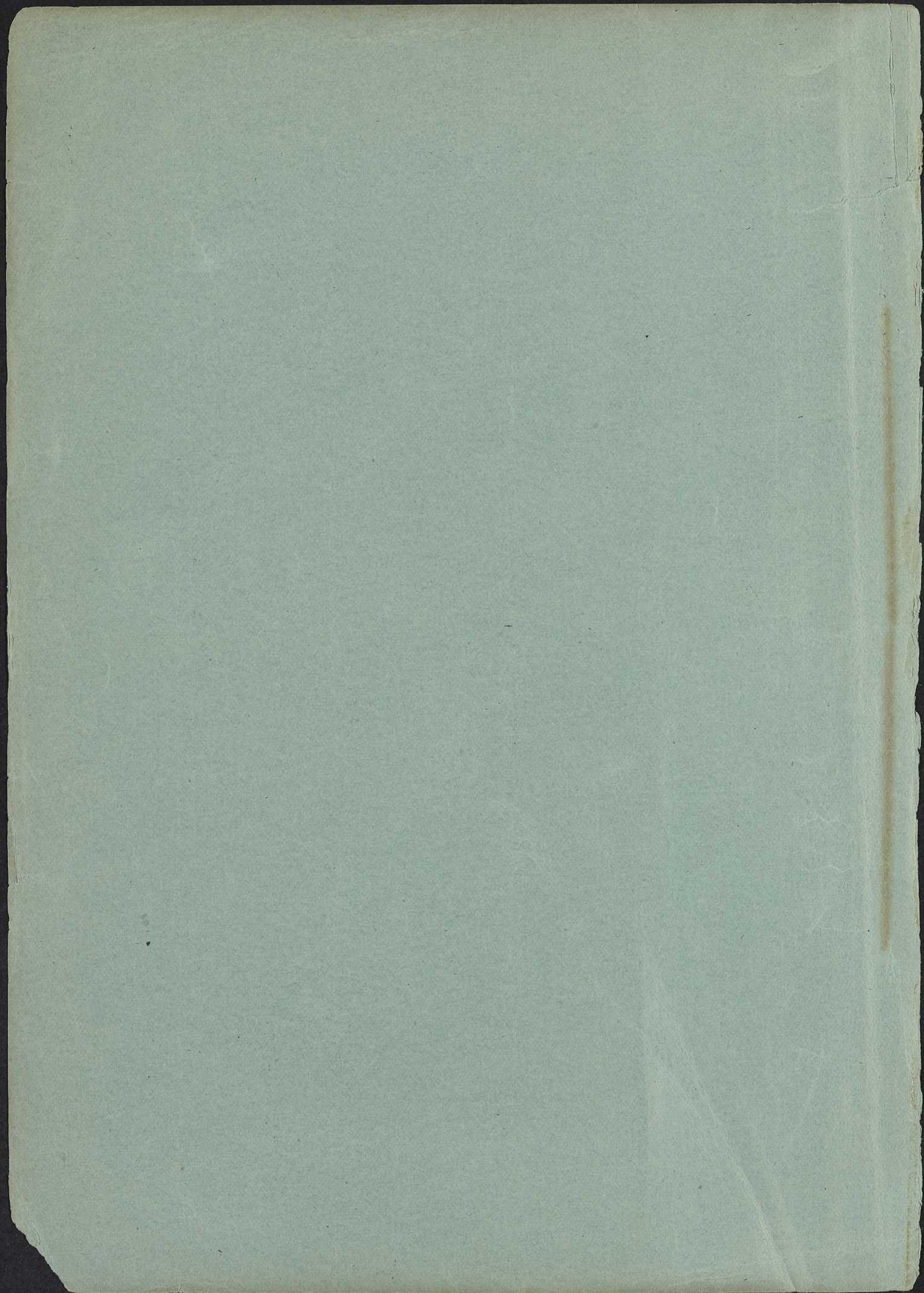
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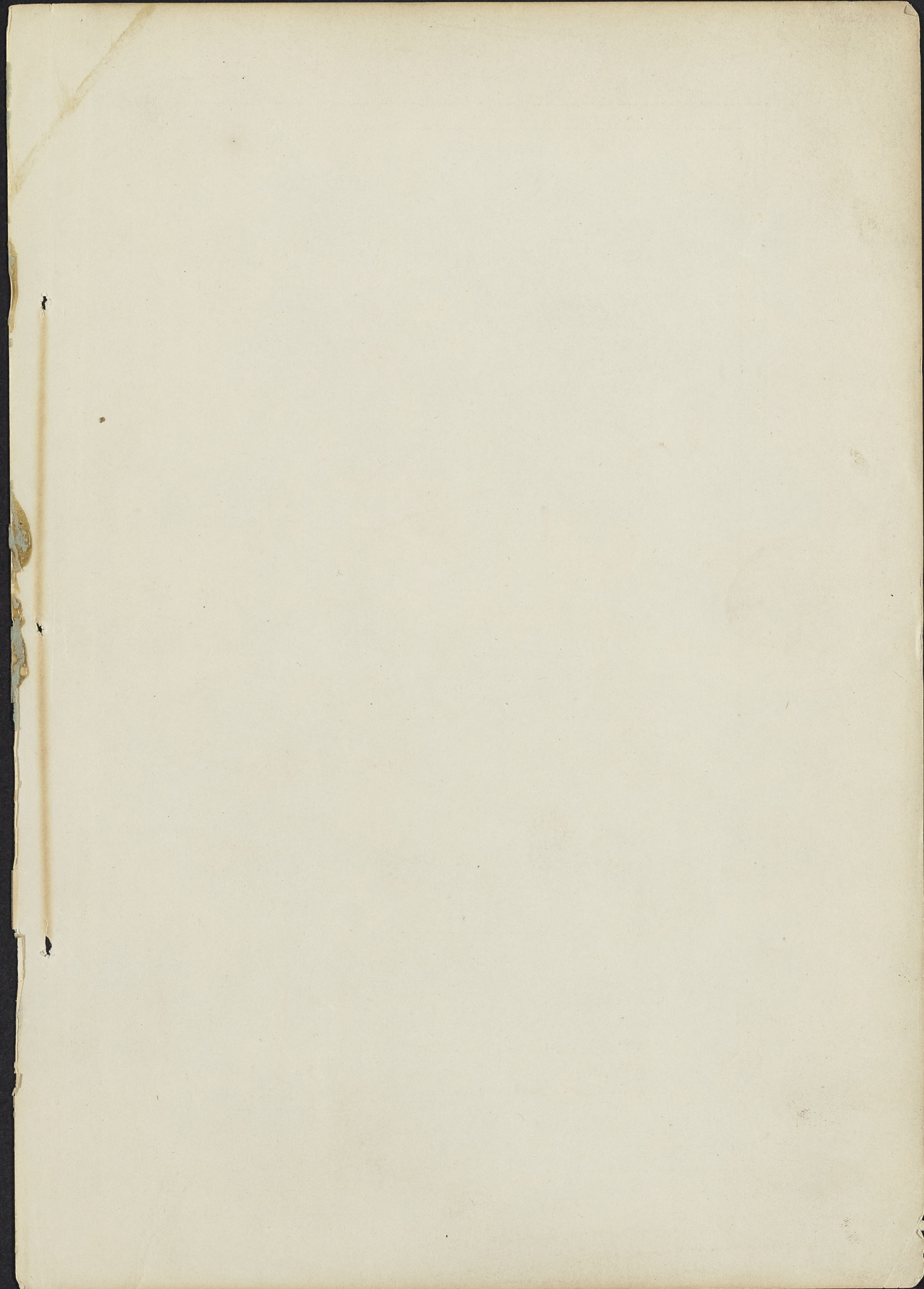
November 6th 1883.

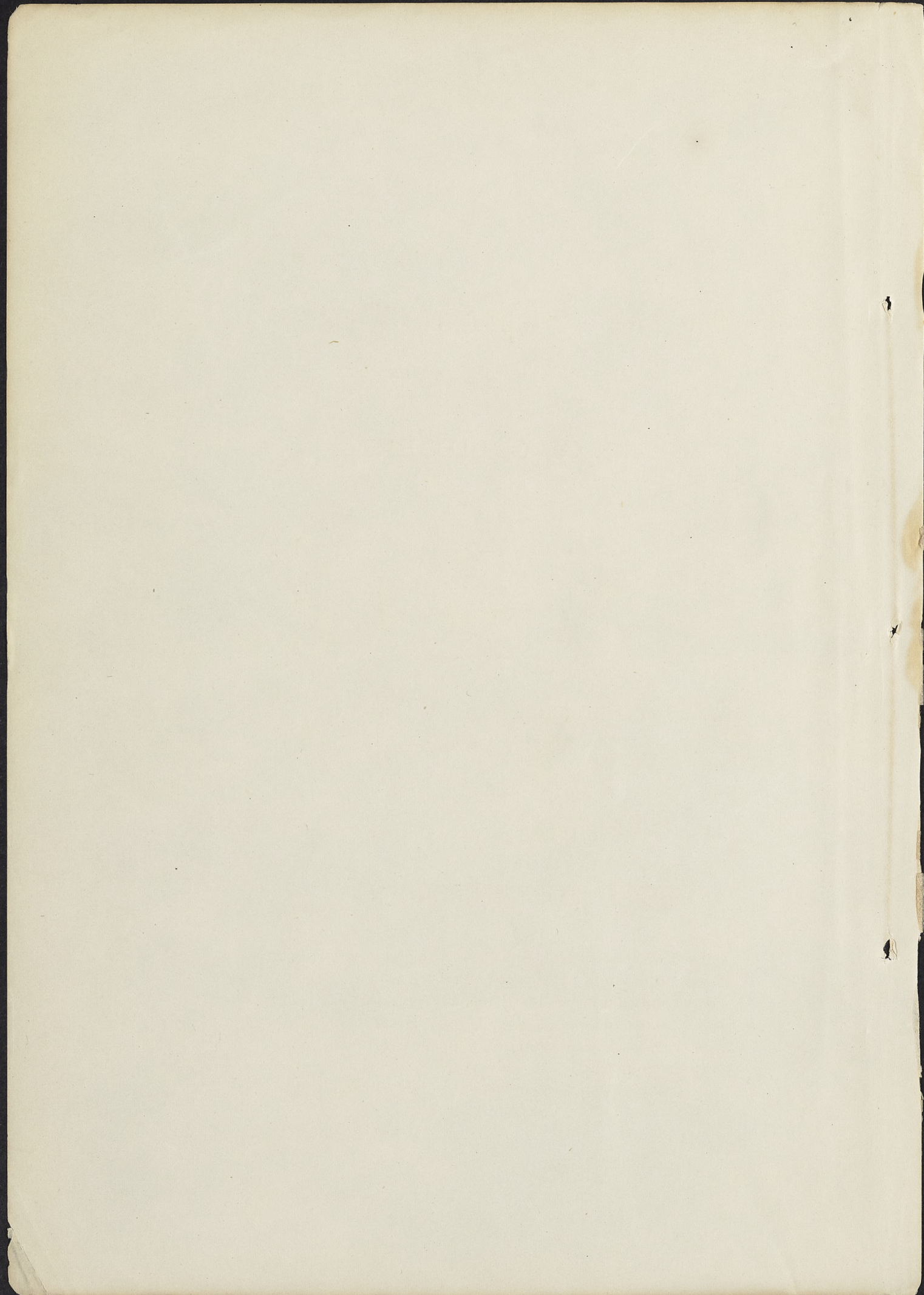
J. W. McCarthy Clerk.

By

J. P. Williams Deputy Clerk.







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BRIEF FOR RESPONDENT.

[We have incorporated into this brief those portions of our Points and Authorities on which we particularly rely. Though this swells the size of our brief, we think it will be to the convenience of your Honors, and will dispense with the necessity of considering both. We, therefore, ask leave to substitute this brief for the Points and Authorities, in which we find, owing to the

haste with which they were prepared, many clerical errors.]

May 12th, 1879, Charles Lux, Henry Miller, James C. Crocker, and six others, commenced this action against James B. Haggin, The Kern River Land and Canal Company, and one hundred and seventeen other defendants, whereby, alleging themselves riparian proprietors on the banks of Kern River, they sought to perpetually enjoin each of the defendants from diverting any of the waters of said stream, and asked damages for the diversions already committed. Subsequently, however, the six plaintiffs other than Lux, Miller and Crocker withdrew from the suit, and the action was dismissed as to all defendants except The Kern River Land and Canal Company.

The present plaintiffs then filed their amended complaint. Defendant answered, denying most of plaintiffs' allegations and setting up much new matter in defense. Plaintiffs moved to strike out portions of the answer. The motion was denied. The action was then tried by the Court without a jury, and judgment was rendered for defendant. Plaintiffs appealed from the judgment and then moved for a new trial; the motion being denied they also appealed from the order denying their motion. Thus two appeals in the same action are now before this Court. These appeals are argued and submitted together.

PLAINTIFFS' CASE.

Plaintiffs (the appellants), owning, as tenants in common, certain lands in Kern County, claim that said lands are situated along Buena Vista Slough, through which, say they, the waters of Kern River flow, and ever have flowed by, through, over and upon their lands, irrigating them and making them fit for cultivation and pasture, besides supplying water thereon

for stock, agricultural, domestic and other purposes; and they claim that, by virtue of their ownership thereof, they are riparian proprietors, and as such, are entitled to have the waters of Kern River flow to them as it has been wont to flow, undiminished in quantity and without deterioration in quality.

They allege that the defendant has, at a point above their lands, diverted and appropriated a portion of the waters of said river, and prevented the same from flowing to them, as it would have done, say they, were it not for such diversion. They did allege that the diversion by defendant was an injury, a damage to them, but on the trial of the case, having failed to show wherein they were injured, or in what manner damaged, they *dismissed their suit for damages*, and asked for an injunction alone.

DEFENDANTS' CASE.

Defendant denies that plaintiffs are riparian proprietors. It denies that plaintiffs have any right to, or interest in the waters of the Kern River, or are in any manner entitled to have said waters or any part thereof flow to their said lands. It denies that plaintiffs' lands are situated along or upon any natural stream or water-course, or even upon Buena Vista Slough itself, except in so far as they lie within the bed and between the banks of Buena Vista Swamp, to which the name "Buena Vista Slough" is sometimes applied. It denies that any natural stream or water-course flows along, by, through, over or upon said lands, or any part thereof.

Defendant contends that, even should it be admitted that the waters of Kern River naturally and usually flow through a continuous and well-defined channel to, through, over and upon plaintiffs' lands, still, as against defendant, plaintiffs are not entitled to any relief, legal or equitable, for:

1st. The so-called doctrine of Riparian Rights whereby a proprietor of land bordering upon a running stream is presumed to have a right to the full, free and uninterrupted flow of the waters of such stream, is not, and never has been the law of this State; at least, so far as appertains to State or Government lands, as contra-distinguished from those held by Mexican grant.

2d. Whatever be the applicability of the doctrine of Riparian Rights as to other lands, it is not applicable to the swamp and overflowed lands donated to the State by Act of Congress of September 28th, 1850.

3d. Whether applicable or not to lands granted by the State prior to May 1st, 1872, at which date Title VIII, Part IV, Division II of the Civil Code (Secs. 1410 to 1422) went into effect, this doctrine of Riparian Rights is not applicable to any lands owned by the State at any time subsequent to that date.

4th. Assuming that the doctrine of Riparian Rights prevails within this State, defendant, as the licensee of the Government of the United States, the supra-riparian proprietor, is entitled to take out and divert, use and consume the amount of water by it diverted for the uses and purposes to which such water has been applied, the amount thereof being reasonable and not disproportionate to the size of the stream and the uses to which it has been applied being the supplying of natural wants.

5th. By virtue of a compliance by itself, its predecessors in interest and grantors, with the general and local customs well established and recognized as the common law of the United States and of this State in the matter of and relative to the appropriation, diversion and use of water and the acquisition of water rights within the State of California, as well as with the Statute laws of the United States and of this State on such subjects made and provided, defendant has appropriated, acquired, and become entitled to, and now is entitled to, and of right may take out, appropriate, divert, use and consume 74,000 inches measured under a four-inch pressure of the flowing waters of Kern

River; and its right so to do is prior and superior to any rights, riparian or otherwise, which plaintiffs have in or to the waters of said stream.

6th. Even if otherwise applicable within this State, the doctrine of Riparian Rights cannot apply in plaintiffs' favor and against defendant, whose appropriation, made May 4th, 1875, was expressly licensed, sanctioned and encouraged by the State and the United States, the then paramount owners of both the dominant and servient tenements—plaintiffs' earliest acquisition of title being January 18th, 1876.

7th. Plaintiffs were guilty of such laches and acquiescence as, under the circumstances of this case, disentitles them to relief in equity.

8th. Plaintiffs, having licensed and encouraged the Kern Valley Water Company to, at great cost and expense, intercept at a point above plaintiffs' lands and there take possession and control of, appropriate and divert for its own uses and purposes, all waters which would otherwise reach said lands, cannot now, as against defendant, maintain a right to the uninterrupted flow of the waters of Kern River.

THE FACTS.

PLAINTIFFS' LANDS:

Plaintiffs own several separate and distinct tracts of land in Buena Vista Swamp, Kern County, granted to them by the State of California in sundry lots and at various times, all, however, subsequent to January 1st, 1876. These lands are of that class known as "swamp and overflowed lands" donated to the State by the Federal Government for the purpose of reclamation, under the Act of September 28th, 1850 (commonly called the "Arkansas Act"), and as such belonged to the State until they were so granted to plaintiffs.

KERN RIVER PRIOR TO 1867-8:

Kern River is a natural stream or water-course rising in the Sierra Nevadas and debouching into the plains at a point about ten miles northeasterly from the town of Bakersfield, in Kern County, whence, as far down as to a point in Sec. 17, T. 29 S., R. 28 E., M. D. B. & M., it has always flowed in the same channel; but after reaching said point, the course of the river was anciently, and until to the winter of 1861-2, in part along a channel known as the "South Fork," which there diverged to the left or southerly and, following a course almost due south, emptied into Kern Lake at its easterly end, and in part along the present channel of the river to a point some three or four miles further westward, and thence to the left or southerly along the channel known as "Old River," which, following a southwesterly course, emptied into Kern and Buena Vista Lakes; but until the winter of 1861-2 the South Fork was the main channel of the river. In the winter of 1861-2 a flood closed the South Fork at its head, and thenceforth until the winter of 1867-8, the natural flow of the waters of Kern River was to and through Old River; in times of very high water, however, some water would pass beyond the head of Old River and following the course of the channel known as "New River" down to about Sec. 31, T. 29 S., R. 27 E., would there turn to the right or northward and continue along what is known as "Goose Lake Slough." In the winter of 1867-8, another flood opened up the present channel of New River below Goose Lake Slough; and in the winter of 1868-9 another closed Goose Lake Slough at its head.

KERN RIVER SUBSEQUENT TO 1867-8.

After the flood of 1867-8 the waters of Kern River, in their natural flow and at ordinary stages, divided at the head of Old River and one-half thereof continued down Old River, and the other half (except such portions as passed into Goose Lake Slough), followed the channel of New River. Such continued to be the flow

of the waters of Kern River until the Fall of 1877, when the Stine Canal Company built a head-gate across Old River at its head, and, thereby obstructing the free flow of the waters into Old River, turned the greater portion thereof down the channel of New River, which then became and thenceforth has been the main channel of Kern River. From and after the flood of 1867-8 the waters flowing down New River (except such portion thereof as passed into Goose Lake Slough) continued, in their natural flow, to and into Buena Vista Slough and thence to and into Buena Vista and Kern Lakes.

NEW RIVER:

After leaving Old River, New River follows a southwesterly course and joins Buena Vista Slough at a point known as "Cole's Crossing," in or about Sec. 5, T. 31 S., R. 25 E. Before reaching Cole's Crossing, however, the river divides, at a point in Sec. 23, T. 30 S., R. 25 E., into two channels, the one known as the "South Branch" and the other as the "North or Middle Branch;" but the main flow of its waters and the natural course thereof is through the South Branch. About half a mile down the North or Middle Branch from the point where it diverges from the South Branch there are tracings of an old slough known as "Gage Slough," which connects with Buena Vista Slough at about the southwest corner of Sec. 19, T. 30 S., R. 25 E., but, as it does not appear that any water (except such as has been artificially turned therein for stock or irrigating purposes) has flowed through Gage Slough, said slough can in no manner be deemed one of the channels of Kern River. After leaving the South Branch this North or Middle Branch continues in a southwesterly direction to about the middle of the section line between Secs. 27 and 28, T. 30 S., R. 25 E., and there divides itself into two channels, the one a shallow channel through which no water flows, except in time of high water, continuing to and connecting with Buena Vista Slough at the southeast corner of Sec. 30,

T. 30 S., R. 25 E., the other turning almost due south and joining the South Branch in the vicinity of Cole's Crossing; but, whether passing through the one or through the other of these channels, the waters of the North or Middle Branch, after reaching Buena Vista Slough, continue, in their natural flow, to Buena Vista and Kern Lakes.

KERN AND BUENA VISTA LAKES:

Kern and Buena Vista Lakes occupy the head or southern end of the valley formed by the Sierras on the east and the Coast Range on the west, and lie to the south of Kern River. In their natural condition these lakes, when full, form one continuous body or sheet of water some twenty miles in length and from five to six miles broad.

BUENA VISTA SWAMP:

Buena Vista Slough extends from the extreme northwestern end of Buena Vista Lake to Buena Vista Swamp. Said swamp itself is a strip of low land extending northward to Tulare Lake, some thirty or forty miles long and from three to five miles wide, lying on the western side of the valley and in the trough thereof.

NATURAL DRAINAGE OF KERN RIVER:

But between said swamp on the one side and Kern and Buena Vista Lakes on the other, extending clear across the valley from the point where Kern River enters the plains on the east to the foot-hills of the Coast Range, which rise near by and immediately west of Buena Vista Slough, there is a ridge or stretch of high land dividing the basin of Kern and Buena Vista Lakes from the basin or trough occupied by Buena Vista Swamp and Tulare Lake. The slope of this ridge is greater and more precipitous southward towards Kern and Buena Vista Lakes than it is northward or towards Buena Vista Swamp and Tulare Lake. From the point where Kern River enters the plains it follows

generally along the crest of this ridge, bearing, however, southward, and keeping on the southern slope thereof to Buena Vista Slough, through which, since the formation of New River and until prevented by certain artificial obstructions at Cole's Crossing, it has emptied its waters, there reaching, into Buena Vista and Kern Lakes; and said ridge, extending across Buena Vista Slough at a point north of where New River enters it, has, until the construction of the aforesaid obstructions at Cole's Crossing, prevented said waters from flowing northward towards Buena Vista Swamp, except in times of flood or overflow.

So the natural drainage of Kern River and of the surrounding country is and ever has been to and into Kern and Buena Vista Lakes, and the natural usual and accustomed flow of the waters of said river, whether through the South Fork, through Old River, or through New River, is and has ever been to and into said lakes, their natural, usual and accustomed receptacle, terminus and place of discharge.

OVERFLOWS:

Occasionally, however, in the winter or spring-time of the year, floods or freshets, from excessive rain or melting snow, will cause the river or the lakes to overflow their banks, and a portion of such overflow will find its way northward to Buena Vista Swamp and over some of plaintiffs' lands, following, however, no defined course or channel, but spreading generally from side to side throughout the swamp and squandering itself over the surface thereof as far northward as the water reaches.

PERCOLATION AND SEEPAGE:

It seems, too, that throughout said swamp there is a surface stratum of decomposed vegetable loam, underlying which is a bed of sand, whilst scattered through the swamp are innumerable holes or depressions, lying in all directions, from a few inches to some twelve or fifteen feet deep, and that, owing to the nature of the

sub-soil, and the character of the country, water from Kern River or Buena Vista Lake percolates and seeps through to and rises in these holes and depressions, and at times spreads or flows from one to another, but in no continuous channel or defined course.

BUENA VISTA SLOUGH.

As above stated, Buena Vista Slough extends from Buena Vista Lake to Buena Vista Swamp. Said slough is also traceable into said swamp as far northward as the "Bonestell Place" in Sec. 24, T. 29 S., R. 23 E.; but there it terminates and can be traced no further. From the point where New River enters it northward to said swamp, said slough is continuous and well-defined, but after reaching said swamp to its northern extremity, in Sec. 24, its channel is not continuous nor well defined with bed and banks, but ~~it~~ is shallow and in places detached and consists more of a series of holes than a regular waterway. Before terminating at its northern end, however, this traceable channel cuts across the west half of Sec. 10, and the northeast quarter of Sec. 5, T. 30 S., R. 24 E., portions of plaintiffs' lands (the first having been granted to them on the 15th day of June, 1877, and the second adjudged to them in *People vs. Center* on the 17th day of September, 1878), but it nowhere touches any other of plaintiffs' lands. Whatever waters have gotten down into said swamp, without the aid of artificial obstructions, before reaching any of plaintiffs' lands, have not been confined to said traceable channel, but have spread generally and indefinitely over the swamp, and do not constitute a regular flowing stream, but consist, in addition to the seepage and percolation mentioned, of occasional bursts of water which in time of freshets or melting snow overflow the banks of the river above, or flow out of Buena Vista and Kern Lakes, after having been stationary therein, and inundate the whole swamp as far northward as the water reaches. It seems, too, that the name "Buena Vista Slough" is applied to that portion of the slough or channel north-

ward from Buena Vista Lake until it reaches Buena Vista Swamp, but after reaching the swamp and ceasing to be well defined or continuous, as above stated, it ceases to be distinguished as "Buena Vista Slough," and the term "Buena Vista Slough" is then applied to, and used to designate the whole swamp, and not any particular channel therein.

[Defendant contends that even were it conceded that a stream or water-course exists within the swamp it is the swamp itself which constitutes the bed thereof, and that the banks and boundaries of such stream are the public lands of the United States coming up to the segregation lines of the swamp and overflowed land.]

Prior to the formation of New River, Buena Vista Slough was a sort of drain or outlet through which at times Kern and Buena Vista Lakes, overflowing their banks, would discharge their surplus waters into Buena Vista Swamp; but the flood of 1867-8 in opening up the channel of New River carried down large quantities of earth, sand and other matter and depositing the same in and near said slough north of Buena Vista Lake and south of Buena Vista Swamp, filled up the slough at that point and by enlarging the surface area and holding capacity of said Lakes, rendered less frequent the overflows therefrom; and each year since said flood more sand and sediment, as well as brush and other matter brought down by the river, has been deposited in and near said slough, thereby still further increasing the capacity of said lakes and rendering still less frequent the overflows therefrom.

KERN VALLEY WATER CO.'S CANAL AND LEVEES:

In the fall of 1876 certain parties commenced the construction of two certain canals known, respectively, as the "East Side Canal" and the "Kern Valley Water Co.'s Canal." The East Side Canal commences on Sec. 14, T. 30 S., 24 E., and extends thence some three miles north on the eastern side of Buena Vista

Swamp, but does not touch any of plaintiffs' lands; the other canal, heading on Sec. 14, T. 30 S., R. 24 E., as at present constructed, extends northward along the western margin of the swamp some twenty-four miles and terminates at a point outside of plaintiffs' lands. In June, 1877, the Kern Valley Water Company, a corporation organized for the purpose of acquiring canals and water rights in Kern County and elsewhere within the State, to be used and disposed of for irrigation, transportation, mechanical and other purposes, took possession and control of said canals and thenceforth continued the construction thereof northward toward Tulare Lake. In the Fall of 1877 the Kern Valley Water Company constructed a dam across the slough at Cole's Crossing, south of where New River enters it and, in connection therewith, a levee extending westward to the bluffs or high ground and running eastward from said dam about a mile and a quarter, thereby preventing the waters of New River from flowing to Buena Vista Lake and turning the same northward to the said canals. At the head of said canals and in conjunction therewith the Kern Valley Water Co., in 1877, constructed a certain other dam and levee along the southern portion of Secs. 14 and 15, T. 30 S., R. 24 E., completely across the swamp and thereby obstructed and prevented the natural flow of any water into, through or over said swamp northward of said levee, and appropriated and took possession and control of all waters which reached said levee and turned the same into said canals. The said dam and levee last mentioned are some distance south of the southernmost part of plaintiffs' lands, and were constructed for the purpose of diverting and appropriating all the waters there reaching, and from and after their construction no water has naturally flowed or could naturally flow beyond the head of said canals, or to, or upon plaintiffs' lands. The construction of said canals, dams and levees was undertaken and prosecuted with the knowledge, consent and approval of plaintiffs, who, both before and at the time of their construction, knew of

the purposes for which they were undertaken.

PLAINTIFFS' USE :

In August, 1878, plaintiffs began to cultivate, and thenceforth hitherto have cultivated the west half of Sec. 10, T. 30, S., R. 24 E., and since the dates of their patents plaintiffs have pastured their cattle over the lands described therein. But it does not appear that plaintiffs have otherwise put said lands to any use or taken or had possession thereof.

IRRIGATION AND CUSTOMARY APPROPRIATION :

From the South Fork down to Buena Vista Slough, a distance of about twenty-five miles, there are on both sides of Kern river, and extending many miles therefrom, large tracts of land embracing many thousands of acres, very valuable and productive when artificially irrigated, but which when not so irrigated are barren, unproductive and valueless. Said lands can only be irrigated by appropriating, diverting and conveying to them the waters of Kern River; and from the very earliest settlement of that section of country—as far back as the year 1862, and even earlier—it has been customary for all parties so desiring, to divert, appropriate and convey said waters on to said lands for irrigation and other beneficial purposes, and many canals therefor have been constructed, and valuable prescriptive and other vested rights to the waters of said river have been acquired.

THE DEFENDANT :

The defendant in this suit is a corporation, incorporated on the 18th day of May, 1875, for the purposes, amongst others, of constructing the Calloway Canal, and supplying water to the lands adjacent thereto for irrigation and other purposes.

DEFENDANT'S APPROPRIATION :

On the 4th day of May, 1875, the grantors of defendant desiring to appropriate 74,000 inches of the flowing

waters of Kern River, measured under a four-inch pressure, for the purpose of irrigating the lands along the route of, and susceptible of irrigation by the Calloway Canal, as at present constructed, and for other beneficial uses, posted a notice in writing in a conspicuous place at the point of intended diversion, viz: a point on the north bank of Kern River, in Sec. 13, T. 29, S. R. 27 E, Kern County, where the Calloway Canal now diverges from the river, and in said notice set forth and stated: 1st, that they claimed the waters of Kern River there flowing, to the extent above mentioned; 2d, the purposes for which they claim it and the place of intended use; and 3d, the means by which they intended to divert the water and the size of the ditch through which they intended to divert it. A copy of said notice was, within ten days after it was posted, duly recorded in the office of the County Recorder of Kern County. The said notice was signed by the grantors of defendant, who, within sixty days after the posting thereof, by their voluntary association, formed the corporation defendant, and granted and conveyed to it all their said water right, privilege and claim, and all their claim to the waters of Kern River, and all rights and privileges acquired by them by virtue of the Calloway appropriation and canal; and thereupon, and within sixty days after the posting of said notice, defendant surveyed and staked out the line of the canal as now constructed, and as described in said notice, and began the excavation and construction of said canal, and thenceforth up to the commencement of this action, prosecuted the work diligently and uninterruptedly. At the time of the commencement of this action defendant had constructed said canal to a point where it crosses Poso Creek, in Sec. 26, T. 26 S., R. 25 E., a distance of about thirty miles from its head on Kern River, of the following dimensions, to-wit: One hundred and twenty (120) feet wide on the bottom, with a grade of four (4) feet per mile for the first two and a half ($2\frac{1}{2}$) miles from the said point where it heads on Kern River; then sixty (60) feet wide on the bottom a distance of about two (2) miles, with a

grade of eight-tenths (8-10) of a foot per mile; then eighty (80) feet wide on the bottom for a distance of about three miles, with a grade of eight-tenths (8-10) of one foot per mile; then eighty (80) feet wide on the bottom to Poso Creek, with a grade varying from eight-tenths (8-10) to four-tenths (4-10) of one foot per mile, and having a capacity to carry more than six hundred (600) cubic feet of water per second, but not sufficient to carry the amount of seventy-four thousand (74,000) inches, measured under a four-inch pressure, claimed in the notice of appropriation; defendant had also constructed some thirty (30) miles or more of side or distributing ditches, of from twelve (12) to sixteen (16) feet in width on the bottom, connected with and leading from said main canal, and forming a part of its irrigation system, and irrigating and supplying with water lands along the route of and susceptible of irrigation by said main canal; and had expended in constructing said main canal and side ditches more than one hundred and ten thousand (\$110,000) dollars. And from the commencement to the trial of this action defendant has diligently and uninterruptedly continued to prosecute the work of constructing the said main canal and branch ditches, and has constructed more than fifty (50) miles of branch or distributing ditches, from twelve to sixteen feet wide on the bottom, in addition to those constructed before the commencement of the action.

In the Fall of the year 1875, in pursuance and execution of the intention expressed in said notice of appropriation, defendant dug away and removed a part of the bank of Kern River, at the head of said canal, and thereby diverted and appropriated for the purpose of softening the earth and facilitating the construction of said canal, a small quantity of the waters of Kern River; and since the year 1875, as the construction of said canal progressed, defendant has each year diverted through said canal, and conveyed through it and said ditches to the capacity of said Calloway Canal, a portion of the waters of Kern River, and has appropriated and applied the same to useful and beneficial purposes; that is to

say, to irrigating and supplying with water lands in said notice of appropriation designated, and lying along the route of said canal; and all of said water so diverted by defendant has been needed, used and consumed on said lands.

In all matters and things connected with or relating to said appropriation and diversion of water, defendant and defendant's grantors have fully complied with the provisions and requirements of Title VIII, Part IV, Division II, of the Civil Code.

IRRIGATION A NECESSITY:

The lands designated in said notice and to irrigate which the waters of Kern River were appropriated and the Calloway Canal was constructed, border upon Kern River, and extend therefrom northward in one compact body along the route of said canal. To said lands irrigation is a necessity, and there is no means of irrigating them save by the waters of Kern River appropriated through the Calloway Canal. Without the water furnished them by the Calloway these lands would be, as they had always been before its construction, desert and barren, unproductive and worthless, but with that water they have proven highly productive and valuable, and large portions of them are now settled upon and cultivated by many people. As each succeeding year it will require less and less water to irrigate each acre of these lands, by reason of the fact that when dry and first irrigated they absorb more water than afterwards when constantly irrigated, the water now conveyed by the Calloway will hereafter be sufficient to irrigate seventy thousand acres thereof.

The use to which the water diverted by defendant is applied is to supply a natural want, and the quantity taken is necessary and reasonable.

PLAINTIFFS' LACHES:

At and during the times when the acts constituting the appropriation and diversion by defendants and its grantors were done, plaintiffs knew and were fully in-

formed of the intention of defendant and its grantors to make said appropriation, and of the extent and purposes thereof, and knew that in reliance upon its acquisition of the right to the said water appropriated, defendant was expending, would expend, and had expended large sums of money in the construction of its said works, and were fully informed of all the circumstances surrounding and attending the location, construction and maintenance of the canal and works of defendant, and of the character of said lands and knew that if prevented from using said water so appropriated, all the said labor, effort and expenditure of the defendant would be fruitless and a total loss. Yet, until the commencement of this action, plaintiffs made no objection to said appropriation or to said acts of the defendant, but acquiesced therein, and stood by while defendant from the year 1875 to the 12th day of May, 1879, continued the construction of its canal, and each year diverted the waters of Kern River and applied the same to the irrigation of said lands. Until the commencement of this action defendant did not know that plaintiffs had or claimed any rights in or to the waters of said river, nor did plaintiff notify defendant that they made any claim thereto; and all acts and things done by defendant in and about the diverting and consuming the waters of Kern River by it diverted, were done in the full faith and bona fide belief that, as the prior appropriator of such waters, it had the right to do and commit such acts.

SUPPLY OF WATER IN KERN RIVER:

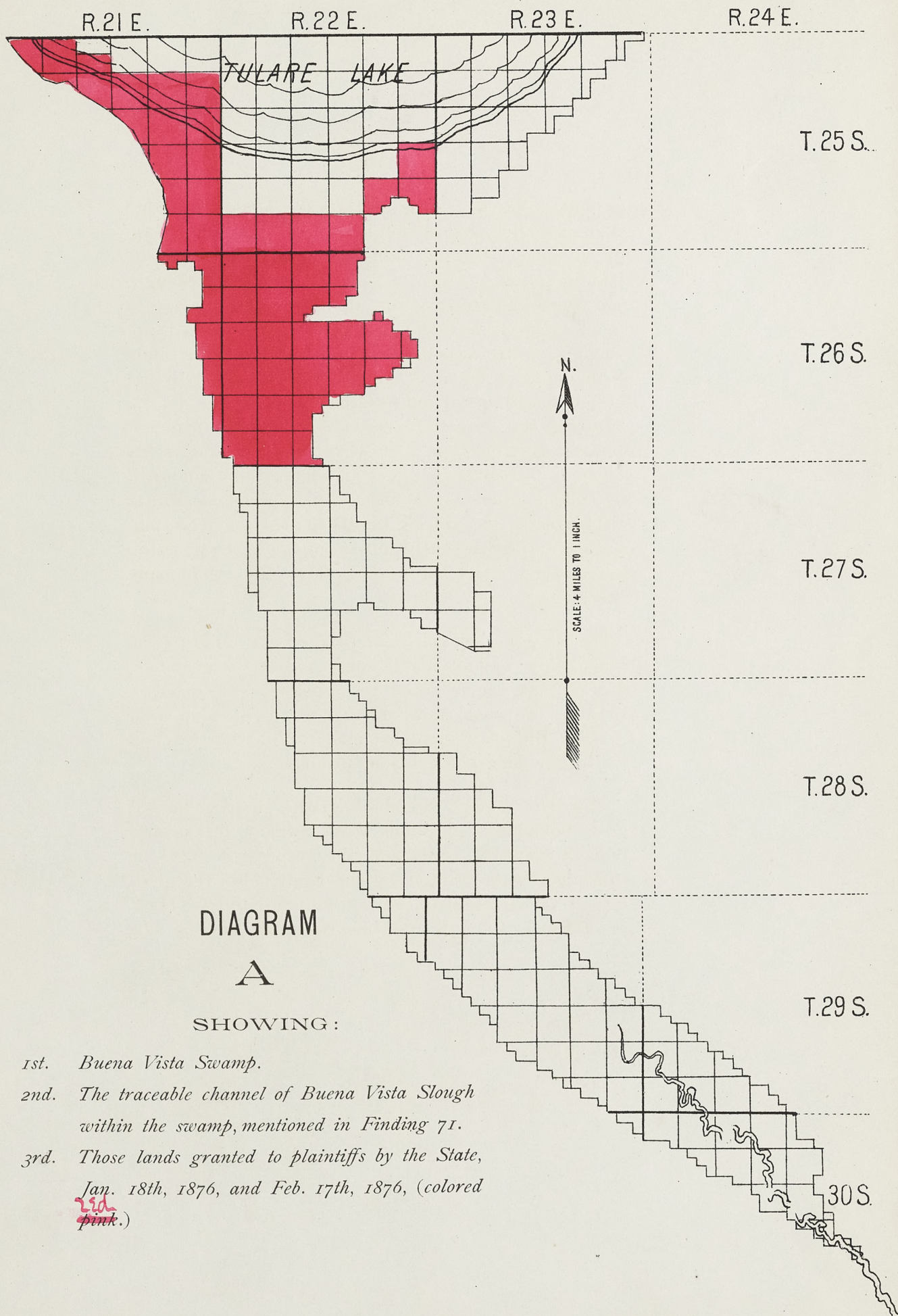
Kern River is not, throughout its whole course down to Buena Vista and Kern Lakes, a perennial stream, nor, during the period of its flow, are the waters therein flowing uniform or constant in amount or volume; but the volume and amount of said waters vary, and are subject to great and sudden fluctuations. Generally the irrigating season along Kern River is from February to July; usually, during said irrigating season, there is ample and abundant water flowing down said river,

not only to fill the canals and ditches heading on said river, including that of defendant, and furnish and supply to them sufficient water to irrigate the lands by them irrigated, but also to flow to Buena Vista Slough, and, since the construction of the dam and levee at Cole's Crossing and the turning of the waters, there reaching, northwards, to wet up and thoroughly irrigate all the lands in Buena Vista Swamp, and supply water thereon for all useful and needful purposes.

During the irrigation season of the year the amount of water diverted from Kern River by defendant is not sufficient to materially affect, or substantially diminish, the volume or amount of water usually reaching Buena Vista Slough; and during the balance of the year none of the water by defendant diverted would, if not so diverted, ever, in its natural flow, flow to or reach plaintiffs' lands.

The foregoing are substantially the facts found by the Court below, and are amply supported by the evidence. Most of them are accepted by appellants as incontrovertible. To some, however, they make objection, and, in their Bill of Exceptions, specify the particulars in which they deem the evidence insufficient.

[We here append certain diagrams, showing the exterior boundaries of Buena Vista Swamp, the several tracts of plaintiffs' lands and the respective dates on which they were granted by the State, also the positions of said tracts with reference to the *traceable channel* of Buena Vista Slough, mentioned in Finding 71.]



DIAGRAM

A

SHOWING:

- 1st. Buena Vista Swamp.
- 2nd. The traceable channel of Buena Vista Slough within the swamp, mentioned in Finding 71.
- 3rd. Those lands granted to plaintiffs by the State, Jan. 18th, 1876, and Feb. 17th, 1876, (colored *pink*.)

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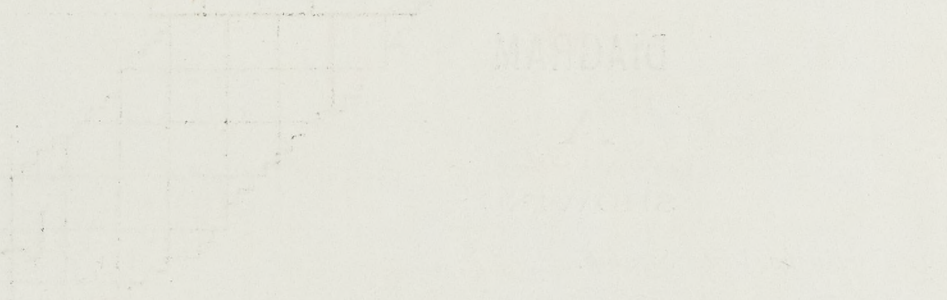
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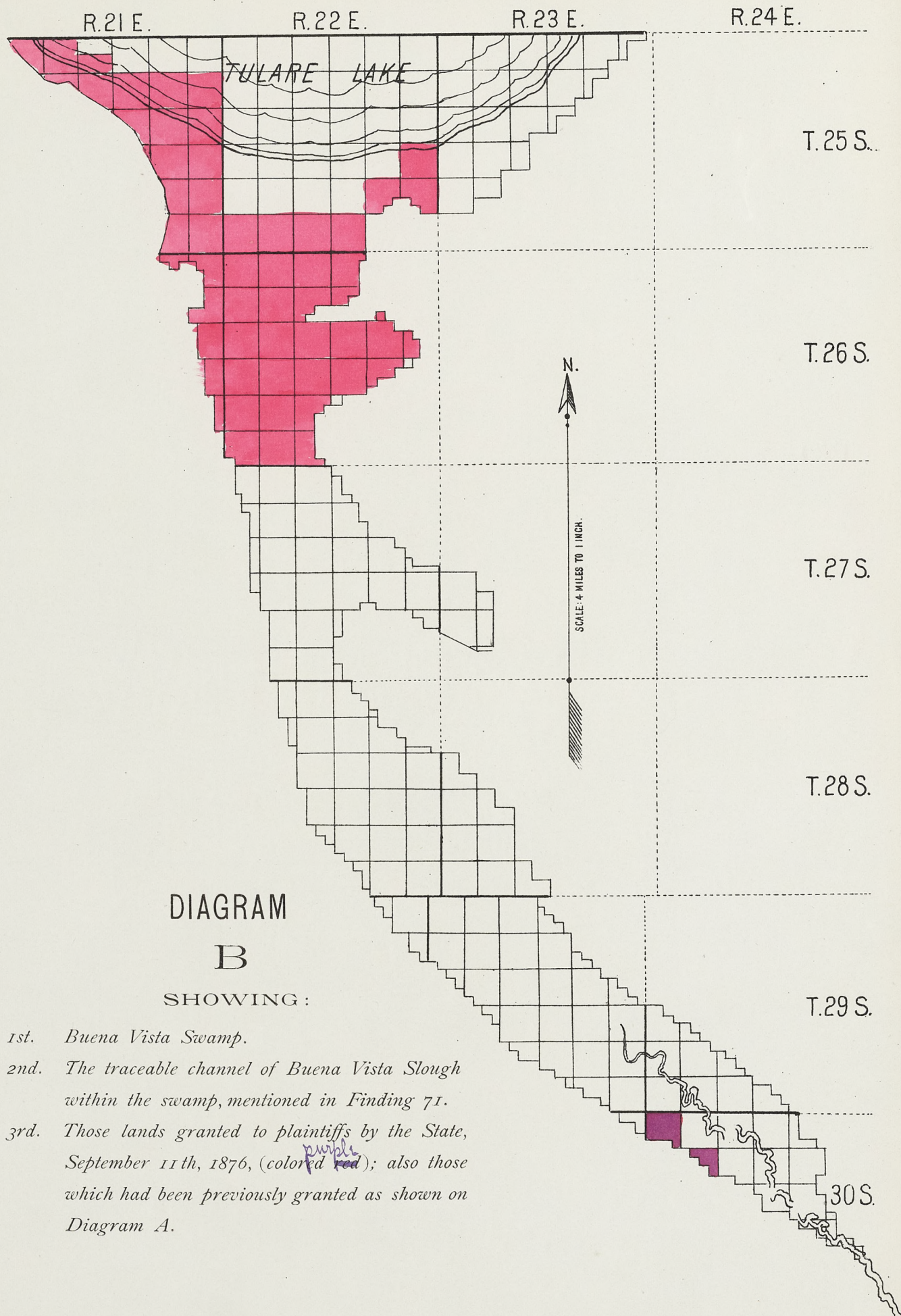
2059

2061

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DIAGRAM



5

DIAGRAM

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DIAGRAM

14

DIAGRAM

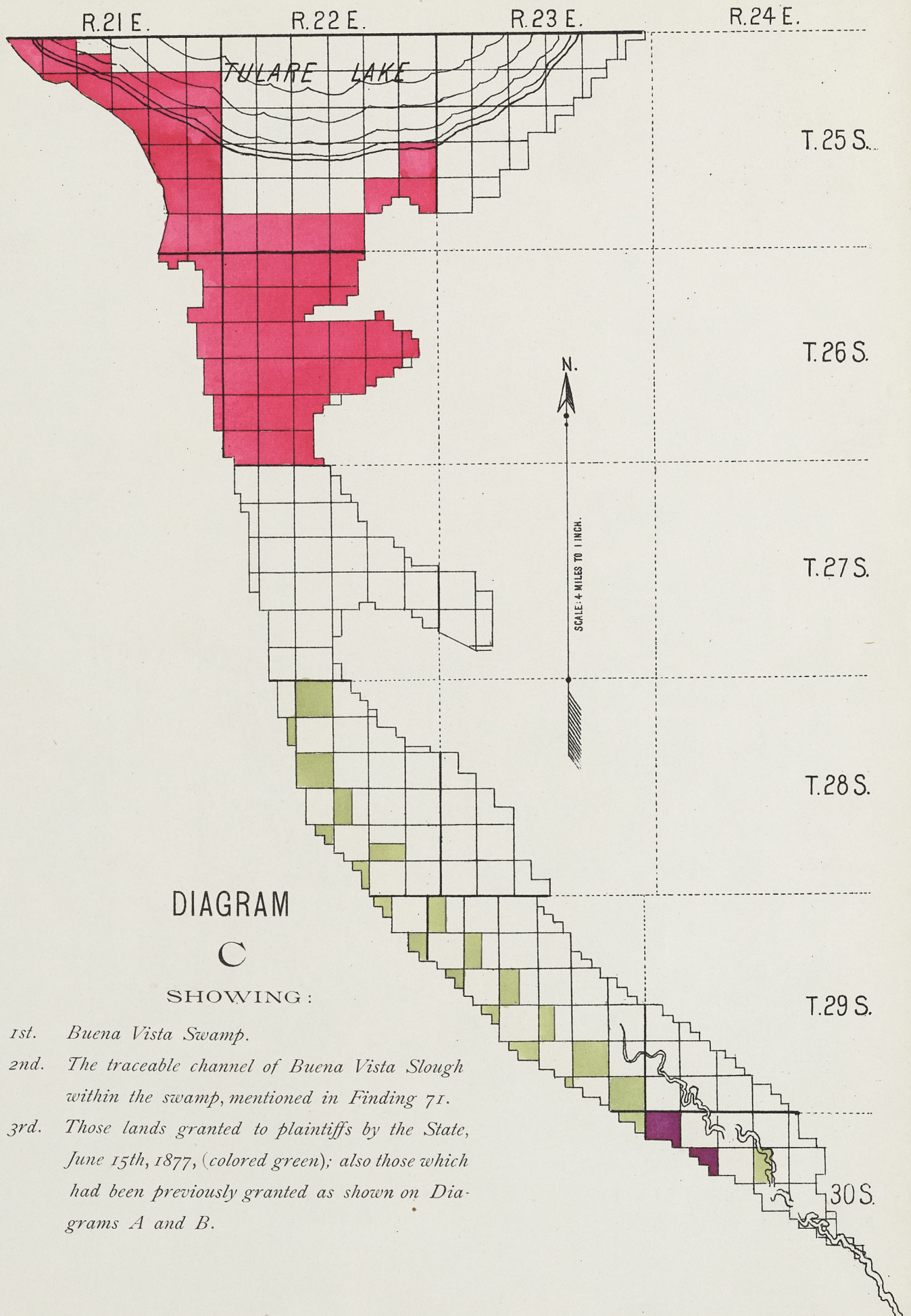
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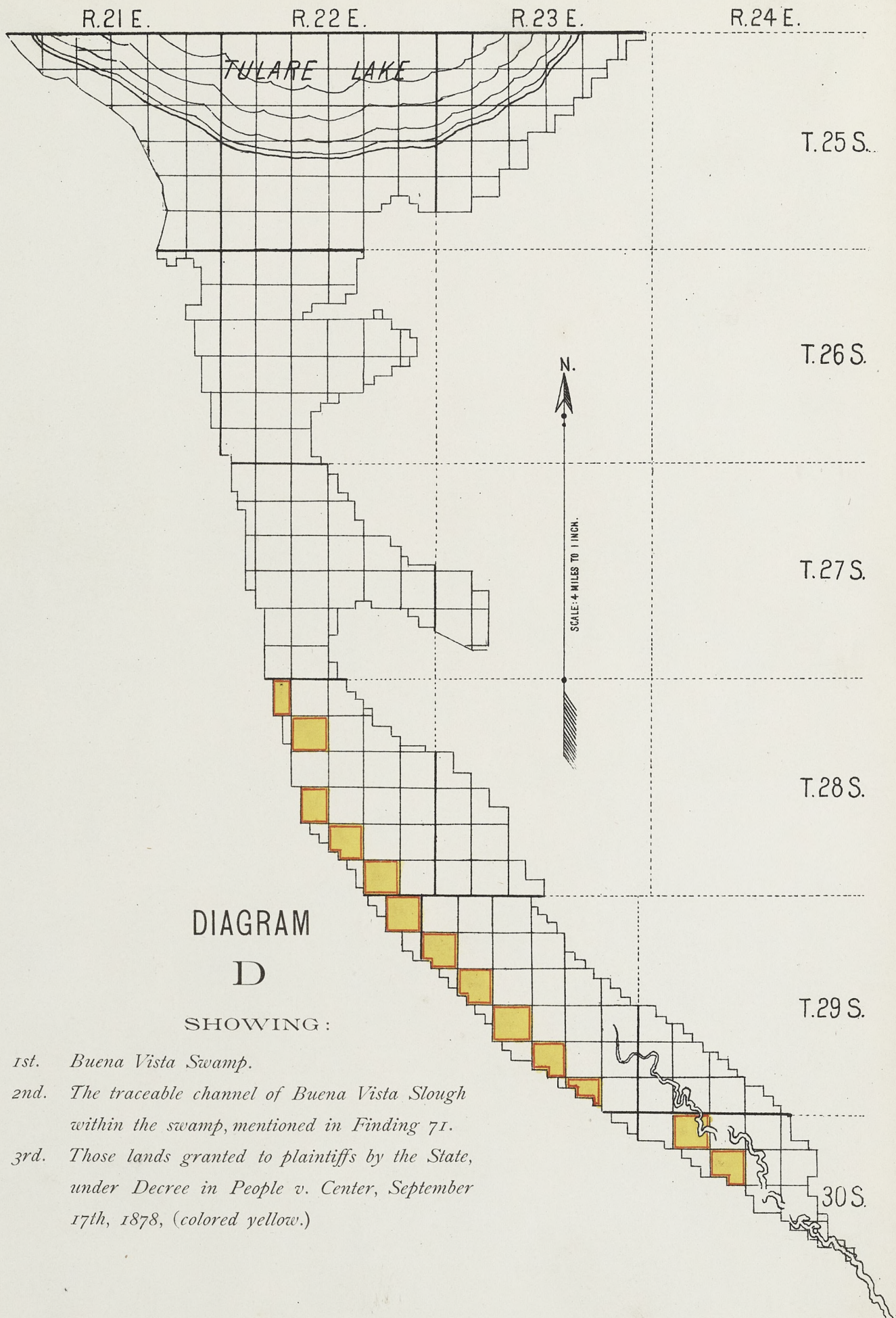
DIAGRAM

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DIAGRAM

17





1956

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1958

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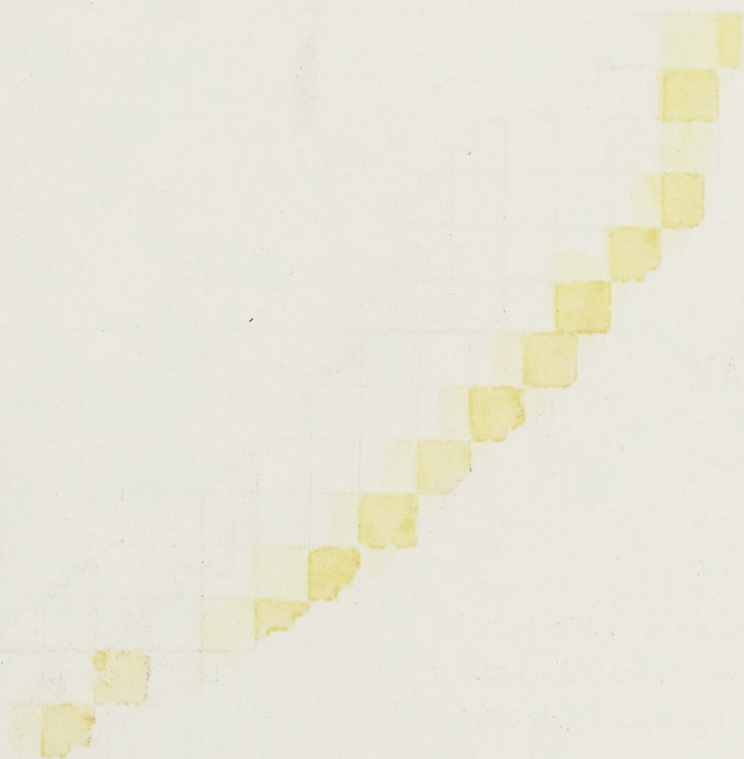
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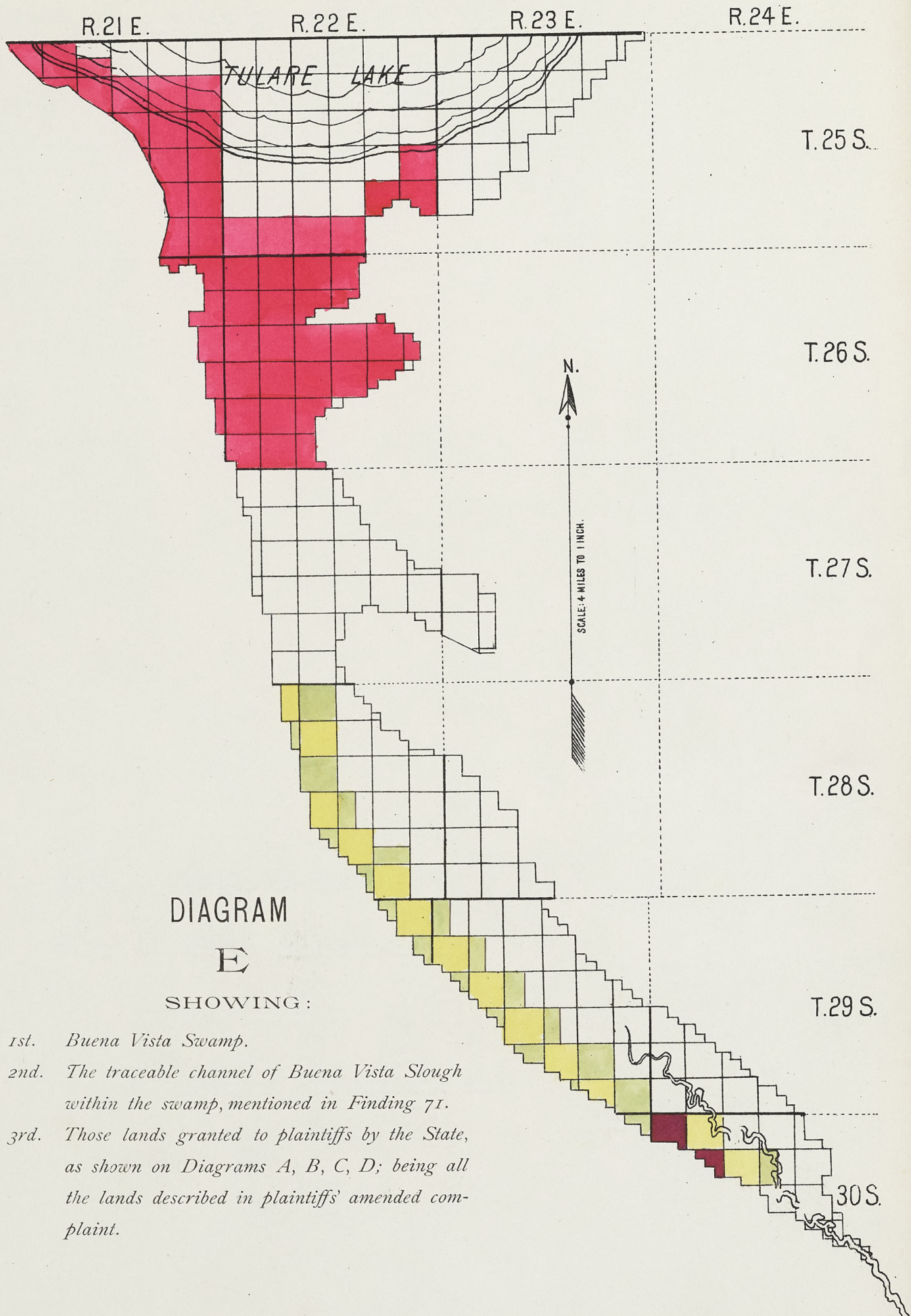
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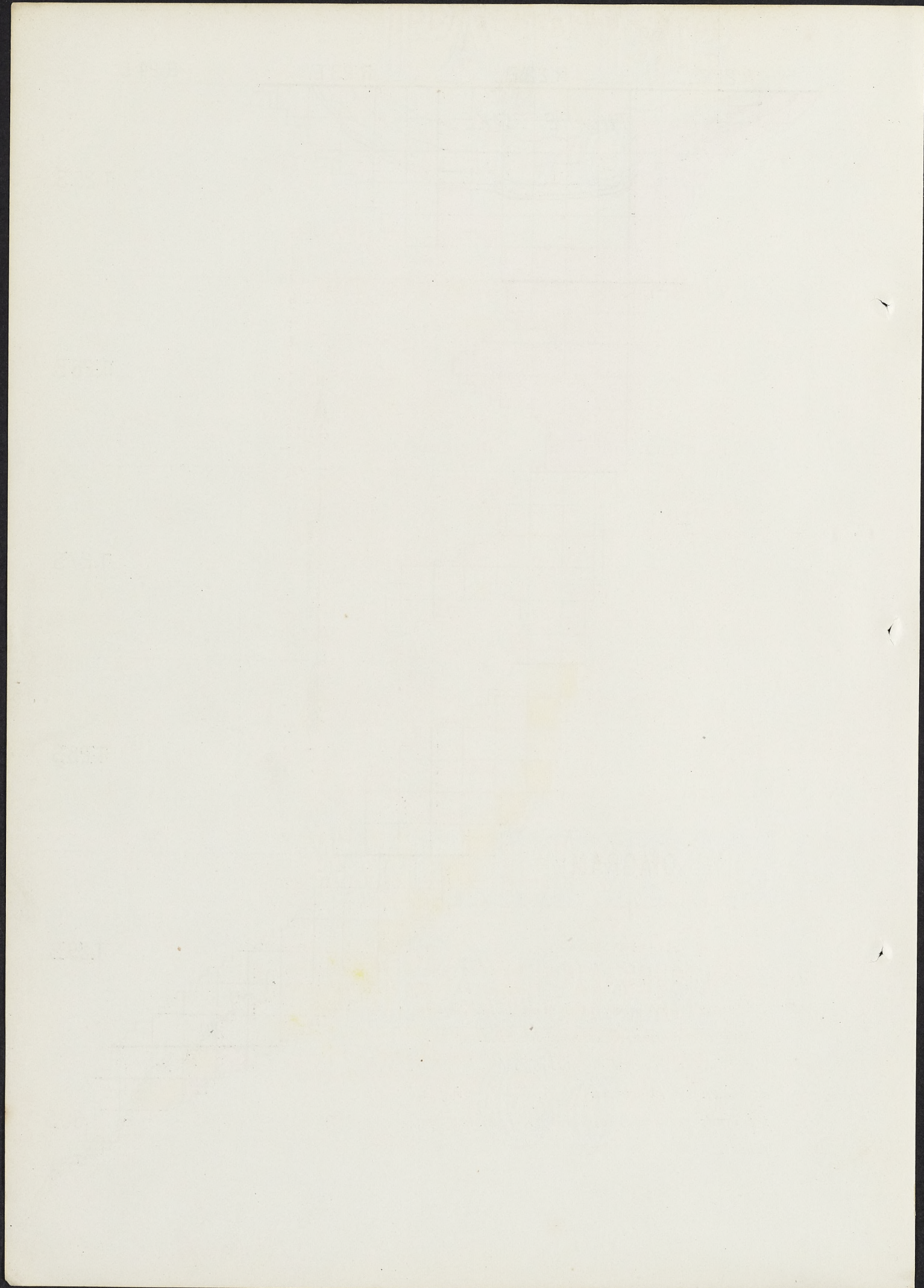
1962

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1964







THE EVIDENCE SUPPORTS THE FINDINGS.

We deem it unnecessary to swell these pages with reference to the evidence in support of those findings and portions of findings to which appellants make no objection; and in answering their Specifications of Insufficiency, set forth in their Bill of Exceptions [Trans. V, pp. 227 to 263], we shall confine ourselves to pointing out, not all the evidence tending to prove each particular fact, but sufficient, merely, to support the finding thereon.

1.

In their 1st and 2d Specifications of Insufficiency, plaintiffs object to the following portion of Finding 2, to-wit:

*“The lands described in the patents mentioned in Finding No. 1 were, until granted by the State of California as set forth in said finding, the property of said State * * * and plaintiffs had not, prior to the issuance of said patents, any right, title, interest, claim, demand, or possession, legal or equitable of, in or to said lands, or any part thereof. And the lands mentioned in said Finding No. 1, as having, in the case of People vs. Center et al., been adjudged and decreed to these plaintiffs, were, until the filing of the decree in the said case of People vs. Center, the property of the State of California, and said State was the owner thereof, and plaintiffs had not, prior to the filing of said decree, any right, title, interest, claim, demand or possession, legal or equitable, of, in or to said lands, or any portion thereof,”*

and contend that, prior to the issuance of said patents, they had an interest in and claim to the lands described in said patents; that the State of California held the same in trust for them; and that, at the times said patents were issued, they were, and long prior thereto had been, in the actual possession of said lands and of every part thereof. They also contend that, prior to the entry of the decree in *People vs. Center*, they had an interest in and claim to the lands therein described, and were, at the time of the entry of said decree, and, for a long time prior thereto, had been in the actual possession of said lands.

In their 64th Specification (objecting to Finding 80), they contend that ever since the year 1869 they have been in possession of all the lands described in the amended complaint.

Plaintiffs' Title.

In their amended complaint, plaintiffs allege that "said lands belonged to the State of California until the year 1876, and later, in which year, and at various times afterwards, they were granted by the State to plaintiffs or their grantors." (T. I, fol. 88.)

And in its answer defendant admits, and itself alleges that "the lands in said complaint described belonged to the State of California until the year 1876, and later." (T. I, fol. 145.)

There is not a scintilla of evidence tending to show any title, legal or equitable, in plaintiff to any of said lands prior to the issuance of the patents in the one case, or to the filing of the decree in the other; nor did plaintiffs make out or establish any interest in or claim to any of said lands at any time prior thereto.

As to those lands described in the decree of *People vs. Center*, the judgment itself in that case (filed September 17th, 1878), declares that these plaintiffs, Miller, Lux and Crocker, have not any right, title or interest

in or to said lands (T. II, fol. 98); and the Act of March 20, 1878 (Stat. 1867-8, page 358), pursuant to which said decree was rendered, provides that, upon the rendition of a judgment in said action awarding any of the lands in said Act referred to, to any party defendant, "a patent shall be issued * * * to such person for such lands, and the title of the State of California to said lands shall vest in the said person, his heirs and assigns, *as of the date of said judgment.*" Thus the very Act which authorized the decreeing of these lands to plaintiffs, fixed the date upon which their title should vest, and precluded the possibility of any retroactive effect of such title.

Plaintiffs introduced a certain deed (T. II, fols. 75 to 89) from Thomas Baker, Julius Chester, H. P. Livermore and John H. Redington, purporting to convey to Henry Miller and Charles Lux what counsel will doubtless argue were portions of the lands described in Finding 1; but it nowhere appears that the grantors named in said deed had any right, title, interest, possession, claim or demand of, in or to the lands they pretended to convey; nor does it appear that the lands intended were ever ascertained, or were even ascertainable. The deed itself describes nothing; gives neither courses and distances, nor metes and bounds, but refers merely to "*the official plats of the U. S. Government Survey*"—surveys which had never been made, and plats which did not exist.

Your Honors will take notice, that under the Acts of Congress and the Regulations of the Department relative to public surveys, the Government of the United States make no surveys within what are termed the Swamp and Overflowed Lands. However, on this subject we have direct testimony, showing, 1st, that no Government surveys were ever made within Buena Vista Swamp, and, 2d, that it is impossible to plat such surveys by merely connecting through the swamp the Government lines established on the east and west sides.

CHARLES D. GIBBS (for plaintiffs) was Deputy U. S. Surveyor under Mr. Hayes, from 1853 to 1854, (T. II., fol. 1382,) and as such assisted in making the surveys in the valley portion of what is now Kern County, from which the Government plats were made. "In 1854," says he, "I surveyed between the Sixth and Seventh Standard lines. I surveyed the following townships :

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"Township 25 S., Ranges 17, 18, 19, ~~19~~, 21, 22, 23, 24 and 25 E.; Township 26 S., Ranges 17, 18, 19, 20, 21, 22, 23, 24 and 25 E.; Township 27 S., Ranges 19, 20, 21, 22, 23 and 24 E.; Township 28 S., Ranges 19, 20, 21, 22, 23 and 24 E." (T. II., fol. 1383.)

That is, he surveyed the *Government lands* within those townships, for, says he :

"I ran none of these section lines or meander lines through the swamp land." (T. II., fol. 1439.) "The swamp land we had nothing to do with; we stopped on the borders of the swamp land." (Fol. 1441.)

"Q. You didn't enter into the body of swamp lands at all?

"A. No. *Our instructions were to stop always on the margin of the swamp land.*" (Fol. 1445.)

Plaintiffs offered a certain diagram marked "Exhibit 6," which Gibbs says he made from certain township plats which Mr. Houghton handed him, (fol. 1404,) and expressed on it "all that is expressed on the thirteen plats, *and more besides.*" (Fol. 1413.)

Now "Exhibit 6" shows the section lines drawn through Buena Vista swamp. We hardly think it possible that plaintiffs will attempt to argue from the fact that "Exhibit 6" shows section lines through the swamp that the swamp was actually surveyed. But lest they should, let us see how those lines happened to be put on "Exhibit 6." Gibbs, being recalled by defendant for the very purpose of showing that the section lines within the swamp on "Exhibit 6" have no business there, is asked:

"Q. In your former examination you stated that some portions of this Map No. 6 were made from certain township plats furnished you by Mr. Houghton, and that other portions were made from other data; that some portions were made from your surveys. Will you designate to me, if you please, what portions of this Map No. 6, were made from the township plats furnished you by Mr. Houghton?

"A. I don't know that I can remember all the numbers of the thirteen townships. * * * [T. IV, fol. 1626.]

"Q. How did you make this portion of the swamp land itself, Township 27 and 28, Range 22?

"A. That had nothing to do with the interior, according to my survey; you will find that in Government plats, we just meander the exterior of it to the body of the tule land.

"Q. You didn't make the interior of this body of swamp land from your survey?

"A. No, sir; you will see it is marked, *because that is a printed plat, and we were in a hurry with the work; we just took those printed sheets.*

"Q. You mean that the section lines in the body of the swamp land are simply marked on the printed plats?

"A. Yes, sir; on these printed sheets; all I did was to take them and fill up to save me the trouble of numbering these sections.

"Q. Outside of the swamp land, you mean?

"A. Yes, sir; the interior has nothing to do with it; *the interior I didn't take from the Government plat; they are only shown here because they happen to be in these printed sheets; that is all.*

"Q. That is, in this whole body of swamp land that you have mentioned here, that is marked on this map here 'Tule Lands,' on Buena Vista Slough, that refers to this whole body of swamp land?

"A. Yes, sir." [Fols. 1629 to 1631.]

And on cross-examination by Mr. Houghton:

"Q. I understand you to say that, as far as the sec-

"tionizing is concerned, or section lines within that
 "plat of swamp and overflowed land, you had nothing
 "to do with running them, nor were they platted from
 "any survey of your own?

"A. Not in the interior of the swamp; you know we
 "only ran up to the swamp and meandered. *That is*
"the State line, and the Government had nothing to do
"with that" [fol. 1632].

J. P. MURRAY [for defendant], as to stakes in the
 swamp, says :

"In 1864 I don't think there was a section there that
 "I did not go over. I saw no stakes there; nothing to
 "mark the sections. I was not looking for stakes; I
 "did not see any." (Fols. 1499-1500.) "In 1869 I
 "was all over the country a great portion of the year;
 "that was my business; I had nothing else to do;
 "I was there in spring, summer and fall; I saw no
 "stakes there that year to mark the boundaries."
 (T. IV, fol 1504.)

F. P. McCRAY, one of plaintiffs' witnesses, having
 previously testified that in 1877 and '78 he sectionized
 portions of Buena Vista Swamp, was recalled by de-
 fendant for the very purpose of showing that it is not
 possible to sectionize or subdivide the swamp by
 merely continuing or extending through it the lines
 established by the Government on the east or on the
 west side. He is asked :

"Q. I understood you to say that, in making this
 "map, you found some Government posts outside of
 "the swamp land, and surveyed from them, and again
 "connected with the Government posts?

"A. What portion of the swamp land do you refer
 "to?

"Q. Some portion on this that you referred to, Map
 "No. 3, either one of these two maps, Map 2 or Map 3.

"A. Well, the lower Map, No. 2, was subdivided by
 "myself.

"Q. I understood you to say that, in finding your

“starting point, you found Government posts and charcoal outside of the swamp, and connected from that to make your survey?”

“A. There are two surveys in there—one that was subdivided by myself regularly, and the other was meandered. * * At the time of the subdivision I connected with the Government corners at all points where there were any connections to be made; then the exterior boundaries were established from the Government corners. * * * The Government corners that I connected with were on both the east and west sides of the swamp.

“Q. Now, what I want to ask you is, whether anyone taking those Government stakes, both on the east and on the west of the swamp, it is possible to connect them so as to make those section lines run through without any change or bending in the lines running across?”

“A. Not at all places; no, sir.” (T. IV., fols. 1640 to 1643.)

“Q. None of them came through from the Government corners on the outside of the swamp, both east and west, without some bend or change of these lines?”

“A. That is, from one point to another.

“Q. Then, in that respect this map is not correct, is it—does not pretend to be?”

“A. That does not show those bends, sir.

“Q. As the sections are laid down here they go straight across, as if they connected with mathematical lines at right angles?”

“A. Yes, sir.

“Q. That is not the fact as I understand it.

“A. Not in all cases.

“Q. None of these lines were connected across in a perfectly straight line?”

“A. When they get to the swamp line they may run straight across the swamp to the other point.

“Q. But in connecting them with Government surveys, you could not take the Government surveys on the east and the Government surveys on the west, and

"have them connect, as represented on this map, with perfectly square lines, could you?"

"A. I don't think you could at all points; there are some points in the southern portion you can."

"Q. With the Government surveys running east and west it would not connect exactly?"

"A. Government work does not connect exactly."

"Q. I don't care about that. It would not connect as laid down on this map, exactly, would it?"

"A. No, sir; I don't know that it would; I have shown a map.—

"Q. (Interrupting.) I am not asking you about that. I only ask you if it is true that they would not connect as laid down?"

"A. Not in perfect squares; no, sir." (Fols. 1645 to 1648.)

And on cross-examination by Mr. Houghton:

"Q. In running these lines across the swamp land, across the land which is represented upon Map No. 2, how much of an error did you make, or how far did you have to run other than straight to make the connection from east to west?"

"A. Well, I don't know that I could answer that question as to how much it was. It has been some time ago."

"Q. Was it a slight error—a slight difference, or a great difference?"

"A. Well, my memory is *there was a great difference in it.*" (Fol. 1649.)

In 1877 and 1878 McCray sectionized all that portion of the swamp shown on "Map B." (T. II, 400-1.) Now, why should he do this sectionizing in 1877 and 1878 if it had ever been done before? Not only is there a total lack of evidence to show that the swamp had ever been sectionized prior to 1877, but every presumption in the case is against such a supposition. The only surveys ever made anywhere within Buena Vista Swamp at any time prior to the surveys of Mc-

Cray in 1877-8, so far as appears by the testimony are those mentioned by C. W. Clarke as having been made during the years 1873 and 1875 (T. II, fols. 1161 to 1163, and fol. 1193.) But to what extent, or for what purposes these surveys were made does not appear.

We are unable to discover upon what ground plaintiffs contend that prior to the issuance of the patents, the State held any of these lands in trust for plaintiffs.

Osgood vs. El Dorado Co., 56 Cal., p. 574, seems conclusive that, as against third parties, there is no presumption of the regularity of official acts, or of a compliance with the prerequisites to the acquisition of Government title. Such matters, if relied upon to show title, must be alleged and proved like any other fact.

Plaintiffs' Possession.

Plaintiffs proved no possession prior to their acquisitions of title set forth in Finding 1. They attempted, however, to establish a possession dating as far back as 1869, or earlier, but the attempt was a failure.

J. C. CROCKER (plaintiff) says:

"In February, 1869, I came to see the ranch, where
 "I am still located in business. I bought it at that
 "time. I refer to the Templor, not this property. That
 "is about fifteen miles west from Buena Vista Slough,
 "in the foot-hills. About March I commenced gather-
 "ing my cattle. I gathered them at about where the
 "Headquarter Camp is, Wible's Camp." (T. II, fols. 485-6.)

Now, Wible's Camp, or Headquarter Camp, is not on plaintiffs' lands, but some distance south thereof; it is in the extreme southeast corner of Sec. 15, T. 30 S., R. 24 E. <J IV fol 1063>.

Crocker continues :

"I have been on the slough from that time to the present time. I was continually working after that time, off and on. In former years we generally ranged our cattle from Buena Vista Lake to Tulare Lake ; some scattering cattle even further north and further south than that. That was where we calculated to keep those cattle—within those bounds." (T. II, fols. 488-9.) "In working in that swamp with our cattle, from the year 1869 to the year 1876, we were all through the swamp. In handling our cattle there we would cross from one side to the other." (T. II, fol. 494.)

Again :

"Q. Do you know where the lines of that swamp and overflowed land within that territory run? (That is the territory shown on plaintiffs' Diagram 3, being the swamp land in Townships 25, 26 and 27.)

"A. Portions of it. I did not survey it. I know only by stakes which I have seen down through on the margin of the swamp and through the swamp." (T. II, fol. 497.)

Speaking of the sloughs through plaintiffs' lands, in the extreme northern part of the swamp, Crocker is asked :

"Q. How is that as to the township below—that is, 25 S. 22 E.? Did they" (*i. e.*) "the sloughs" run through the section that you have on the south line of that township?

"A. They run through the sections. They run through this portion here. I know I helped to run those lines around this portion of the land here. I ran up, I think, about—I would not be positive—I think we run to this township line.

"Q. Do you know that slough, Buena Vista Slough, runs through the swamp that you owned, or that the plaintiffs in this case owned in Township 25 S. 21 E.?

"A. Yes, sir; I know it runs through our lands

"there. I run through the swamp, and I *suppose*
 "have always seen the stakes there that was laid off
 "as our land.

"Q. Do you know where the limits of your swamp
 "and overflowed lands are on the east and west?

"A. Yes, sir. * * * I know the swamp land.
 "I have seen the corners at different points, but have
 "never traced them out" (fols. 499 to 501).

Again referring to Map 2:

"Q. Do you know whether that slough runs through
 "the lands belonging to plaintiffs, that is described in
 "this complaint?

"A. Yes, sir; I have seen portions of that land run
 "off, and I know where it is" [*i. e.* the slough]. (fol.
 502).

The substance of this testimony is that, as to plaintiffs' lands in T. 25 S., R. 21 E., Crocker merely *supposes* that he has seen stakes there that were laid off as his land; and as to those lands of plaintiffs' shown on Map 2, he has only seen portions of them "run off," and knows where the sloughs are. Evidently the portions that he saw "run off" were "run off" by McCray in 1877 and 1878; for had the land ever been surveyed before that date, plaintiffs would certainly have proved such fact.

As to pumping, Crocker says:

"No one pumped water in Buena Vista Slough in
 "1871, according to my recollection. I think I am
 "pretty positive about that."

Afterwards, however, he says: "I would like to correct a statement I made; at least, have time to reflect on it. I am not positive, but I think we did pump in 1871" (fol. 558).

Fol. 569, he says that in 1871 the water ran a couple of months. "After that there was no water in the slough in 1871; only what was pumped." And fol. 714, he says: "In 1871 we had to pump."

Crocker's statement as to his pumping in 1871 are entitled to no credence, for he had previously stated that the first time they put up pumps was in 1876 (fol. 510). He had also stated positively, on direct examination, that "in 1871 the slough was full of water; there was a great deal of water in it."

"Q. Was it running all the time?

"A. In 1871. Oh, yes, sir.

"Q. In 1871?

"A. Yes, sir; it was full of water.

"Q. What was the condition of that slough as regards there being running water down there, down to the year 1876?

"A. There was water there constantly until the year 1876.

"Q. All the time?

"A. Yes, sir; I never saw it without water running there." (Fols. 490-491.)

"Q. When was the first time that you ever saw that slough without any water in it?

"A. In 1876 and 1877. (Fol. 507.)

At a subsequent period in his testimony he says that in 1871 there was a big stream of water running in the swamp; that he swam the channel in three different places to get onto Weed Island. (Fols. 609-610.)

"Q. Now, along there in the spring of 1871 you saw these three streams running with that amount of water, all full?

"A. Yes, sir.

"Q. How long did that water continue to run in that year, in that way?

"A. It ran in that way until along in the latter part of the season. It stayed all during the season.

"Q. What do you mean by a whole season?

"A. The whole year.

"Q. The whole year?

"A. Yes, sir.

"Q. Are you positive about that?

"A. I think so.

"Q. Did you see that in 1871—that state of affairs?

"A. Yes, sir.

"Q. Take your time to think, and see if you are sure about that.

"A. I think I am. We had to swim our horses across.

"Q. Was it the same thing in 1872?

"A. Yes, sir.

"Q. And in 1873? The same appearance there in 1873?

"A. Yes, sir; as near as I can recollect." (Fols. 612-614.)

F. A. TRACY, (for plaintiffs,) speaking of 1871 being a dry year, says: "I *think* the water was scarce enough that year to require pumps. I *think* Mr. Crocker had pumps at that time." (T. II, fol. 996.)

J. M. LEWIS (for plaintiffs) says in 1871 he went to the slough.

"Q. Was there any pumping done there in 1871?

"A. There was some. I was there for a week, perhaps, on the slough, along in April or May, from the Statens Corral to the Adobe Holes. Saw no water there. I *suppose* they were pumping water. I had nothing to do that year with the cattle in the tules." (T. II, fols. 1064-1065.)

Again:

CROCKER is asked by Mr. Houghton:

"Q. You have spoken of the fact that there was a dry season when you pumped there in the year 1870 or 1871. Can you fix the year? I have not the testimony before me. There was a dry season you testified to, I understood you, in answer to a question Mr. Garber asked you, either in 1870 or 1871.

"A. In 1871.

"Q. How do you know that was the year 1871?

"A. We had to pump, and other things in connection with it that I know of.

"Q. Well, what other things?

" A. Well, there is one circumstance that I know
 " of. We bought the land there in 1870, and immedi-
 " ately after that I rigged up the pump and we went to
 " pumping.

" Q. Then it was after you bought the land and
 " went into possession—the year after you bought the
 " land and went into possession—that there was that
 " short season of water?

" A. Yes, sir; 1871.

" Q. You speak of buying the land. For whom was
 " that purchase made? Was that purchase made the
 " year previous to that dry season?

" Mr. Garber—One moment. The deed will be the
 " best evidence.

" The Witness—I think the purchase was made—

" Mr. Garber—One moment. I object. The deed
 " is the best evidence.

" Mr. Houghton—The deed is in evidence. I want
 " to fix the time the purchase was made.

" Mr. Garber—The deed will show what year it was.

" Mr. Houghton—It won't show, because he made
 " several purchases.

" Mr. McAllister—There was one deed in 1872.

" Mr. Garber—And one in 1877.

" Mr. Houghton—Q. Mr. Crocker, you said there
 " was one circumstance in connection with the pur-
 " chase of that land that enabled you to fix the year
 " 1871. I will ask you what purchase that was, and
 " who from?

" A. Will you allow me to look at the deed?

" Mr. Flourney—We object to that.

" Mr. Houghton—I will repeat that question without
 " offering the deed.

" The Witness—I have to take this entirely from
 " memory. I am not prepared to answer the question
 " until I can refer to dates." (Question again read by
 " the reporter.) "That was what I wish to refresh my
 " memory about. I know there were several pur-
 " chases." (T. II, fols. 714 to 718.)

Now, it is patent that, when asked "*Then it was after you bought the land and went into possession—the year after you bought the land and went into possession—that there was that short season of water?*", Mr. Crocker's answer, "*Yes, sir; 1871;*" was simply in response to "*When was the dry year?*" His answer was not intended as responsive to that portion of the question relative to possession; he had not that in contemplation; he was asked as to a dry year, and fixed it "*in 1871*" But should it be insisted that he meant to state that he went into possession in 1870, we then submit that such testimony proves nothing. It is too vague; does not specify the particular lands entered upon; nor does it show an entry under claim of title. A mere naked possession, even if proved, can avail plaintiffs nothing against the rights of defendant acquired from the State.

After having closed their case, plaintiffs, by permission of the Court, recalling Crocker, asked :

"Q. When did you commence pasturing your cattle upon the land described in the amended complaint?

"A. In 1870. (T. II, fol. 2383.)

Crocker also added: "At the time we bought the land and came in possession of it." But this portion of his answer not being responsive to the question asked, nor within the permission given, was afterwards ordered stricken out. (T. III, pp. 33-34.) We call attention to such fact, lest in the vast amount of matter presented by the Transcripts in these cases, it might escape your Honor's notice.

F. M. EPPERLY (for plaintiffs) says :

"In 1871 I settled at Dover's Camp—where Dover's Camp is; I don't know what section that is on; as far as the sections are concerned, I know nothing about the sections, but I think it was Section 1. * * * My business was caring for hogs at that time; I owned hogs; I owned no land there; I got land of Mr. Crocker there; rented it from him. I came there in May, 1871,

"and left there in May, 1876. The range of my hogs
 "was from the lower end of Weed Island, down to about
 "five or six miles below the Dover Camp, making a dis-
 "tance, I should think, of about nine miles—eight or
 "nine miles in length, the range that my hogs ran over;
 "might be more; might be less; I couldn't say.

"Q. How much land did you rent from Mr. Crocker?

"A. I rented with the privilege of running hogs in
 "there; no particular lands specified at all; I could not
 "tell exactly how much I did pay him for it; I never
 "paid him anything in money; what I did pay him was
 "in work; a portion of the work he paid me for, and a
 "portion he did not; it was understood that I should
 "look out for stock there; * * * when I saw any
 "in distress—bogged down, or anything of that kind—
 "I relieved them; that was understood with Mr. Crocker
 "when I went there, that I should do that for the priv-
 "ilege of running my hogs there." (T. II, fols. 2253
 2255.)

Dover's Camp, referred to by Epperly, was on Sec. 1,
 T. 29 S., R. 22 E. (T. II, fol. 670). This was one of
 the sections acquired by plaintiffs under the decree in
People vs. Center (T. II, fol. 105), in and to which, as
 we have shown above, plaintiffs had no right, title or
 interest whatever prior to September 17th, 1878—to
 which, in fact, they did not even attempt to show color
 of title prior to that date. Now, located on a tract of
 land in which plaintiffs had no interest whatever, what
 were the lands which this hog-man rented from Mr.
 Crocker? *No particular land specified at all.* It does
 not even appear that the lands rented were on the west
 side of the swamp—the side upon which are situated
 the lands now owned by plaintiffs.

Such is the evidence, and such, substantially is all of the
 evidence which can possibly be adduced, in support of
 plaintiffs' claim of possession. Yet it proves nothing.
 It shows no entry under color of title; no particular
 lands entered upon; no lands enclosed; does not even
 show what land was "laid off" by the stakes which
 Crocker *supposes* he has seen in the swamp; nor does it

show upon what portion of the swamp the presumed pumping of 1871 was done.

Now, on the other hand, to show that plaintiffs had no possession:

J. P. MURRAY (for defendant) as to pumping in 1871 says:

"I was a good deal through that swamp in the year 1871. * * I spent a good deal of my time there that year.

"Q. How is it as to the amount of care that cattle require in a dry year compared with a wet year?

"A. You had to rush around there to find feed and water to save them. In 1871 I was driving cattle, picking them out of places where they were not doing very well, and driving them there, where they would do well; driving them up in this country, on the island. I think I was all over this swamp land district during that year. I had to go over it to try and find my cattle. I didn't want to lose my calves. There were other cattle men in there, and I wanted to keep even with them." (T. IV, fol. 1507-8.) "In 1871 I worked all through there with my cattle, in the fall, spring and summer. I don't think there were any pumps down there in the country between Tulare and Buena Vista Lakes in that year; I saw none there; if there had been any I should have seen them." (Fols. 1505-6.)

And as to stakes in the swamp, Murray says:

"In 1869 I was all over the country a great portion of the year; that was my business; I had nothing else to do. I was there in Spring, Summer and Fall. I saw no stakes there that year to mark the boundaries." (T. IV, fol. 1504.)

Besides, we have seen from the testimony of Gibbs and McCray (*Ante*, pp. 22 to 26) that the swamp was not sectionized prior to 1877; and from their testimony, coupled with that of Clarke, (*Ante*, p.27) it must be presumed, in the absence of any testimony to the con-

trary, that no surveys were ever made, and no stakes ever set, within the swamp prior to the surveys mentioned by Clarke in 1873.

But even were it possible to deduce a presumption of possession from the above testimony, such possession was by no means exclusive, for there were many others besides plaintiffs who were pasturing their cattle and running their hogs, as well upon those lands claimed by plaintiffs as upon the balance of the lands in Buena Vista swamp, and whose possession was, in all respects, similar and equal to that of plaintiffs.

CROCKER is asked relative to pumping in 1876:

"Q. Did the plaintiffs, Miller, Lux and Crocker, put up those pumps?

"A. Yes, sir; we put up a part of them, and the firm of Cox & Clarke put up a part of them.

"Q. For your own cattle, I mean; or were you running your cattle together?

"A. We were running them together." (T. II, fols. 512-513.)

F. A. TRACY (for plaintiffs) says that in 1864, '65 and '66, he (Tracy) was down with his stock along the slough, crossing it from time to time. (T. II, fol. 925.) In 1867-68 he was still ranging his stock along the slough, on both sides, all the distance between Buena Vista and Tulare Lakes; was crossing to and fro in 1867-68. During 1869 was all along the slough with his stock; had stock on both sides of the slough; was crossing to and fro all of the while. (T. II, fol. 930.) He had his cattle still there in 1872. In 1872, '73, '74 and '75 was still running his stock along the slough, the same as he had been doing in the years previous. (T. II, fol. 939.)

R. B. STILL (for plaintiffs) in 1874 was working with cattle for Cox & Clark along the west side of the slough, from about ten miles north of Tulare Lake to within about eight miles of Buena Vista Lake, (T. II, fol.

758); and in 1875, during the whole year, until August, was working with cattle and branding calves, camping in various places along the west side of the slough, between Buena Vista and Tulare Lakes. (T. II, fol. 762.)

THOMAS L. BRIGGS (for plaintiffs) drove cattle to the slough in 1864; was there in 1866, getting up cattle; in 1874 was there again, gathering scattering cattle; was along the whole length of the slough, from Tulare to Buena Vista Lake; in gathering cattle, would cross from the outside slough to the islands (T. II, fols. 1091 to 1094); was also there in 1875 getting up cattle (fol. 1097), working in the swamp all the time (fol. 1099).

C. W. CLARKE (for plaintiffs) had cattle along the slough in 1865 (T. 2, fol. 1146); worked all over the slough, from Tulare Lake to Tracy's Crossing (fol. 1147); in 1869 was up and down the slough, on the west side, working with cattle (fol. 1154); was there again in 1874 gathering his cattle (fol. 1159).

T. W. BARNES (for plaintiffs) was on the slough in 1869, working back and forth with his cattle and hogs; also in 1870 and '71 (T. II, fol. 1330).

W. McFARLAND (for defendant) says that in 1872 Crocker was living at the Templor Ranch; also in 1875; that that was Crocker's headquarters at that time (T. IV, fol. 1471).

J. P. MURRAY (for defendant) has been in the stock business since 1852; had cattle ranging all over the island, and around Kern and Buena Vista Lakes; brought cattle there first in 1864—about 1,000 or 1,200 head (T. IV, fols. 1496-7); drove his cattle to the head of Tulare Lake, and worked all the way up through Buena Vista Swamp (fol. 1498). Says he:

"The first time I knew Mr. Crocker having any cattle in this country was in 1869 or 1870; I met

“his men through there, and I knew his cattle; they
 “were working all through the country here. Crocker
 “had cattle all over the country. I have seen his
 “men all over Tulare County, going up to Fort Tejon
 “and Santa Maria, attending all the rodeos, Linn’s
 “Valley, Poso Creek, up Kern River, on Tule River
 “and north of Tule River.” (Fols. 1502-3.)

Murray says that during the year 1869 everybody
 had cattle there (fol. 1503). “During the years 1869,
 “’70 and ’71, there were probably 40,000 or 50,000
 “cattle there, or more. Pat Murphy had cattle there;
 “Mr. Jones, I think; Crocker had cattle there, and
 “Miller & Lux, and Cox & Clarke, and Lynch &
 “Fowler, and Blackenship, Bacon, and one or two or
 “three of his boys. In 1870 I could have sold my
 “cattle there for 2,500 cattle. I was there also in
 “1871; worked all through there in the Fall, Spring
 “and Summer” (fol. 1505). “I continued to keep
 “my stock there in that swamp until 1877; was along
 “up there every year until that time; the same con-
 “dition of affairs existed, with regard to cattle, as had
 “existed before” (fol. 1535). “In 1877 Mr. Lynch
 “and I had 10,000 cattle; Miller & Lux talked about
 “buying them for 12,000 head” (fol. 1537).

TRACY says that during the year 1875 there were
 from 30,000 to 40,000 head of cattle on the lands along
 the slough (T. II, fol. 1020).

CROCKER says that, on the swamp lands along
 Buena Vista Slough, during the years 1872, ’73, ’74
 and ’75, there were from 25,000 to 35,000 head of
 cattle, belonging to different parties (T. II, fols.
 719-720).

Yet during these years, from 1869 to 1875, whilst
 there were from 25,000 to 50,000 head of cattle, belong-
 ing to different parties, along the swamp, plaintiffs
 themselves, who claim to have been in possession of
 so large a portion of it, had only about 1,200 head of

cattle on the swamp; for, says Crocker: "When I first went there, we estimated to have about 1,200 head of cattle. That was in 1869. * * * During the years 1873, '74 and '75, I suppose we had *about the same number as we had previously*" (T. II, fols. 492-3); but, "in 1876" (after plaintiffs had acquired some of their lands, and could enjoy the exclusive possession thereof), "we might have had 10,000, or might have had 15,000 cattle." (Fol. 493.)

2.

^{then}
In ~~the~~ Specifications of Insufficiency, Nos. 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 14, 15, 16, 26, 27, 33½, 35, 36, 37, 38, 39, 50, 51, 54, 55, 56, 62 and 63, objecting to all or portions of Findings 3, 4, 5, 7, 8, 9, 11, 12, 13, 14, 16, 17, 18, 30, 31, 40, 45, 46, 47, 48, 49, 65, 66, 70, 71, 72, 78 and 79—relating more or less to Buena Vista Slough and the flow of water to plaintiffs' lands—plaintiffs contend, in substance, that Buena Vista Slough is a natural stream or water-course, through which the waters of Kern River, both before and after the flood of 1867-8, have been wont to flow through and along plaintiffs' lands, to and into Tulare Lake; that the channel or channels of said slough are well defined and continuous, and carry within their banks the usual and accustomed flow of the waters of said river.

It would occasion too much repetition, and trespass too much upon your Honors' patience, for us to answer seriatim each specific objection suggested by plaintiffs to these findings; whilst by answering the substance of their objections, we not only support each fact found, but are enabled to treat the questions involved in a more concise and logical manner. We will refer, however, more specifically to the several findings as occasion suggests.

Kern River Prior to the Flood of 1867-8.

There is but little dispute as to the course of the river prior to the flood of 1867-8, as described in Findings Nos. 6, 7 and 8. It is admitted on both sides that, up to the time of said flood, the natural, usual, accustomed and almost invariable flow of the waters of Kern River was to and into Kern and Buena Vista Lakes, however they may have gotten there or whatever may have become of them thereafter, the only controversy between the parties being: First, Whether or not it was usual and customary for these waters to flow out of the lakes through Buena Vista Slough (which we shall hereafter discuss under the heading "Buena Vista Slough"); and, Second, The immaterial objection suggested by plaintiffs to the fact stated in Finding 8, that:

"In the winter of 1861-2 a flood closed the South Fork at its head, and thenceforth, until the winter of 1867-8, the natural flow of the waters of Kern River was down to and through Old River."

SOL. FRIED (for plaintiffs) is asked:

"Q. What change did the flood of 1861-62 make in the running of the water in Kern River?"

"A. It changed it clear off, entirely away from where it ran before.

"Q. Did it leave a portion of the water still in the South Fork?"

"A. No, sir. * * * After the flood there was no water running down there. It turned the water all away, and we went up and turned it back, myself and others, and then it continued to run down through the new channels" (T. II, fols. 223-4).

On cross-examination, Fried states:

"The flood of 1861-2 closed up the South Fork, and shut off the water from running down that fork.

“ Q. And you went up there with others and opened up the channel again?

“ A. We opened *another channel*. The object was to get water down here for irrigating purposes, to irrigate on the south side of Bakersfield and in several places along in there—places in the immediate vicinity of Bakersfield. We made a canal or ditch about 6 or 7 feet wide and about $2\frac{1}{2}$ or 3 feet deep. We used the water turned in there for irrigating, and when we did not do that we turned it out into different sloughs. (T. II, fols. 227-8.)

“ Q. When the water left the Old South Fork dry in 1861-2, that Winter, what course did the water take? What became of the water?

“ A. *It changed off on to the north side. I don't know where it went to.*” (Fol. 230.)

The testimony of this witness is clear and positive that the flood of 1861-2 closed up the South Fork entirely, and that after said flood a new channel, ditch or canal, through which water was artificially turned for irrigation purposes, was cut from the river.

SOL. JEWETT (for plaintiffs) states that the flood of 1862 turned the river further to the north—the main channel; that after 1862 the main channel of the river was what is now called Old River. (T. II, fol. 243.)

P. A. STINE (for plaintiffs) says:

From 1862 to 1868 Old River carried nearly all the water; Goose Lake Slough would be full in the Spring of the year until it began to go down; then the slough would fill up and all the water would come down Old River. (T. V, fol. 405.)

W. J. CANFIELD (for defendant):

“ Old River was the main channel of Kern River until 1867 and 1868.” (T. III, fol. 1683.)

Kern River after the Flood of 1867-8.

Plaintiffs make no objections to the description given in Findings 9, 10 and 11 of the course of the waters of Kern River after the flood of 1867-8 other than as to what becomes of the waters which flow down New River below the point in Sec. 23, T. 30 S., R. 25 E., where the "North or Middle Branch" diverges from the "South Branch." But lest they may hereafter claim that in their 50th Specification of Insufficiency (objecting to Finding 65) they impliedly dispute the fact found in Findings 9 and 10, that "*from the flood of 1867-8 until the Fall of 1877, one-half of the waters of Kern River, in their natural flow and at ordinary stages, passed down the channel of Old River,*" we refer your Honors to the testimony of several witnesses in support thereof.

Old River.

SOL. JEWETT (for plaintiffs):

"In the spring of 1868 New River was opened. After that water continued to run in Old River. I should judge half of it ran in Old River from that time on." (T. II, fol. 253.)

E. D. CROSS (for defendant):

"Have known Old River since 1869." (T. III, fol. 462.) "Crossed Old River frequently from 1869 to 1876; also crossed New River very frequently during the same time. Have crossed New River and Old River about the same date; have crossed and re-crossed both rivers the same day."

"Q. What is your judgment as to the relative quantity of water carried along during those years up to 1876, before the last head-gate was put in Old River, —as to the relative quantities of water carried by Old

“and New Rivers? From your observations, which carried the most?”

“A. From the first time I was there until the head-gate was put in in 1877, I should think Old River would carry more water than New River. That was my impression from crossing both streams” (fols. 466 to 468.)

THOMAS HOKE (for defendant) says that from the first time he went there (1870) up to some time in 1877 Old River would be quite high every spring; always high in the spring. “In the spring of 1877 the water in the river was low—not so high as usual. There has been very little water there since the spring of 1877.”

“Q. Do you know any reason for that?”

“A. I presume it was on account of the head-gate being put in in Old River—at the head of Old River. Prior to the putting in of that head-gate there was always high water in the spring; since then there has not been. The Stine Canal Company put in that head-gate.” (T. III, fols. 851-852.)

J. R. WATSON (for defendant):

“Before the dam” (*i. e.*, the Stine head-gate) “was built Old River carried about an equal proportion of water with New River” (T. III, fol. 1272.)

J. NIEDERAUR (for defendant):

“Have lived in Kern County since December, 1869.” (T. III, fol. 1302.) “Have seen Old River ever since I have been here. (Fol. 1313.) Have crossed New River every year. Have crossed it in the neighborhood at the same time that I have crossed Old River. (Fol. 1311.) “I always thought that Old River carried more water than New River; it always looked to me as if the current was stronger.”

“Q. Has the volume of Old River decreased—the volume of water—since 1877?”

“A. Up to the time the Old River head-gate was put in, the volume of water in Old River was about

"the same every year, as far as I could see. It has decreased since the head-gate was put in. The Stine head-gate is what I refer to. I cannot say when that was put in. I refer to the head-gate which was put in at the head of Old River itself, across the river" (fols. 1313-1314).

WALTER JAMES (for defendant):

"The fall of Old River from its head is approximately seven feet per mile. The fall of New River is from four to six feet mile." (T. III, fol. 143).

S. H. ANDERSON (for defendant):

"Q. What is your opinion as to the relative amounts of water in Old River, compared with that in New River, in 1871, '72, '73 and '74?

"A. Well, Kern River was running from the melting of the snow in the spring, and the Old River carried the bulk or biggest volume of the water. But when there was a freshet, or the flood in the river was greatest, New River seemed to carry a very large volume of water also. When Kern River was down, and running a small amount of water, Old River seemed to take the biggest portion of it. And in time of flood, a big body would go down New River. In a stage of low water, Old River would carry the biggest body of water" (T. III, fols. 1733-4).

[The Stine Canal head-gate across the head of Old River was put in in the fall of 1877 (T. III, fol. 872, and fol. 1362; T. IV, fol. 9).

New River.

Finding 11. "*New River diverges from Old River towards the right, but not northerly. After leaving Old River it runs southwesterly and joins Buena Vista Slough, at or about Section Five (5) in Township Thirty-one (31) South*

Range Twenty-five (25) East of Mount Diablo Base and Meridian, at the point known as Cole's Crossing, and so designated on the map hereto annexed, and flows thence to Buena Vista and Kern Lakes, and does not join Buena Slough in or near Section Thirty (30), Township Thirty (30) South, Range Twenty-five (25) East of Mount Diablo Base and Meridian, except that in times of high water a portion of its waters do flow through a shallow channel (shown on the map to these Findings annexed), and empty into said Slough on or about said Section Thirty (30), and thence flow into Buena Vista and Kern Lakes.' (T. I, pp. 119, 120 and T. V., p. 203.)

As stated above, there is no dispute as to the course of the waters of New River down to the point in Sec. 23, T. 30 S., R. 25 E., where the "Middle or North Branch" and the "South Branch" separate. That your Honors may the better understand the testimony of the several witnesses relative to the course of its waters from that point on, we here call attention to certain undisputed facts set forth in Findings 67 and 68:

Finding 67. *"In December, 1875, one Souther commenced, and in January, 1876, completed a dam across Buena Vista Slough at a point designated on the map hereto annexed as 'Cole's Crossing,' on or about Section Five (5), Township Thirty one (31) South, Range Twenty-five (25) East, Mount Diablo Base and Meridian, and south of where the waters of New River enter Buena Vista Slough, and thereby at said point checked the natural flow of the waters of said river through said slough into Buena Vista and Kern Lakes, and caused the waters there flowing to take a northward course and away from the said lakes. In March, 1876 the pressure of the waters against said dam broke through the same and said river resumed its natural flow to Buena Vista and Kern Lakes."*

Finding 68. *"In the fall of 1876, certain parties commenced the construction of two certain canals, which are correctly laid down on the map hereto annexed and marked respectively 'East Side Canal' and 'Kern Valley*

Water Co.'s Canal. The 'East Side Canal' commences on Sec. 14, T. 30 S., R. 24 E., and extends thence some three miles north on the eastern side of Buena Vista Swamp. * * * The other canal, heading on Sec. 14, T. 30 S., R. 24 E., as at present constructed, extends northward some twenty-four miles. * * * In June, 1877, the Kern Valley Water Company * * * took possession and control of said canals, and continued the construction thereof northwards towards Tulare Lake. In the fall of 1877 the Kern Valley Water Company reconstructed the dam at Cole's Crossing, and in connection therewith, constructed a levee extending westward to the bluffs or high ground, and running eastward from said dam about one and one-quarter miles, thereby preventing the waters of Kern River from flowing to Buena Vista Lake, and turning the same northward to their said two canals." * * * (T. V., pp. 194-195.)

We will hereafter show that the construction of these dams at Cole's Crossing have materially interfered with the natural flow of the waters of New River after reaching Buena Vista Slough.

W. R. MACMURDO, (for defendant,) having his attention called to Map "H" is asked:

"Q. Do you know anything about that map "H"?

"A. Yes, sir; I know that it is a map of the end of Kern River and part of Buena Vista Slough.

"Q. Is that map correct?

"A. Yes, sir; it is substantially correct. * * *

"The levee at Cole's is substantially correct; it extends about a mile and a half east, and on the west it extends a short distance, and runs out to the high ground.

"Q. What are those channels marked on that map; that is, this one dotted here and there through Sections 22, 21, 20, and a portion of 19 and 20 (? 30).

"A. That is what is called the North Branch of Kern River, sometimes called 'Gage Slough.'

"Q. And the next one there, through Sections 23,

"22 and 27, which is marked in blue, running south to the dividing line between 28 and 27?"

"A. That is the Middle Branch.

"Q. And the other is what?"

"A. The South Branch of Kern River.

"Q. What is the yellow one through 28 and 29?"

"A. That is the continuation of the Middle Branch, which is filled with sand, in many places almost entirely so. The course of the water in Kern River, from Tracy's Crossing down, is all of it continuous down Kern River until it reaches the forks on Section 23; there it divides, and a part goes down the South Branch and a part goes down the Middle Branch." (T. IV, fol 1183 to 1186.)

Before following the course of the water through these two branches—the South and the Middle—let us first and once for all get rid of plaintiff's pretended third branch, (mentioned in their 5th, 8th, 9th and 50th Specifications,) termed the "North Channel," or

Gage Slough.

In the first place, Gage Slough cannot properly be considered a separate or independent branch of New River. At best, it is but a minor branch of the Middle Branch itself, and in no manner affects or decreases the flow of the waters to or into the head of the South Branch; for, whatever waters pass or have passed into Gage Slough, are those only which it takes from the Middle Branch some half a mile or more below the point where that branch diverges from the South Branch.

WALTER JAMES (for defendant), on cross-examination:

"Q. Where does Gage Slough leave the main river?"

"A. On Section 22, T. 30, R. 25." (T. III, fol. 237.)

The South and Middle Branches divide in the east half of Section 23 (*vide* Map H), and consequently more than half a mile from any point in Section 22.

R. L. DIXON (for defendant):

"Gage Slough leaves the river below the Joyce ditch; below that perhaps half a mile, may be a little more." (T. III, fols. 547-8.) "The Joyce ditch is below the point where the South Branch branches from the other branch of the river" (fol. 509); "it is 400 or 500 yards below the mouth of the South Branch." (Fol. 514.)

JAMES DIXON (for defendant):

"In 1872 I struck what is known as the Gage Slough, running through Sec. 20. I found water in that slough; if it was running, it was a very slow current. In places it is very deep; I suppose it was 10 or 12 feet deep there. I have seen that place repeatedly since. I think it is the same depth now that it was then, and it has pretty much the same appearance. I have been along the Gage Slough, north and south, east and west, or whatever direction it runs. It does not continue the same depth all the way. It runs out into a swamp; no channel at all. The water that was in it then came from the river. It does not connect with it by any definite channel at all. * * * At the point I struck it, in Sec. 20, it has perpendicular banks. You cannot cross it with a horse or anything else. Deep holes. Following it east, I suppose a quarter of a mile from the eastern boundary of the section, it flattens out into a swamp on Sec. 21. There is no perceptible channel there at all on Sec. 21 until you get clear across the section. On the eastern boundary of the section, near the northeast corner, I put in a head gate. At that point it forms a channel again. There is no channel between the eastern boundary of Sec. 21 until you get within per-

“ haps a quarter of a mile of the west boundary of
 “ Sec. 20; that is a swamp. I suppose the slough was
 “ 30 feet wide where I struck it. I suppose where it
 “ goes out of that section on the west side it is not
 “ more than 10 feet wide, and perhaps 2 feet deep at
 “ the 10 foot place.” (T. III, fols, 8, 9, 10.)

A channel 10 feet wide by 2 feet deep makes but a
 sorry show as “a branch of Kern River.”

On cross-examination Dixon says :

“ Gage Slough is a channel which leaves the river
 “ south of where the present head-gate of the Joyce
 “ ditch is ; as to how far south would be a mere guess ;
 “ perhaps a quarter or half a mile south.

“ Q. What was the condition of the mouth of that
 “ channel when you first saw it, of the Gage Slough, in
 “ 1873 ?

“ A. I saw a portion of it that I put my head-gate in ;
 “ I didn't see the mouth of it until later in the summer ;
 “ at that time there was a broad, sandy channel, and the
 “ water had almost ceased to flow through. What I
 “ mean is, the mouth of what is known as the Gage
 “ Slough, where it comes out. It continued in that kind
 “ of a channel for two hundred yards beyond that point.
 “ *It could not be called a channel ; it was a kind of swamp,*
 “ *a low, flat place that the water had spread out over, and*
 “ *unless you confined the water and forced it along in the*
 “ *lowest place, it would not stay there. You had to confine it*
 “ *and make it go on until the channel further along was*
 “ *better developed.* The overflow that I speak of was
 “ very wide ; I cannot tell you how wide ; a part of the
 “ water would run back into the river again, and flow over
 “ the surface, and find its way back again into the river at
 “ that time. I suppose it extended four hundred or
 “ five hundred yards before it came into the chan-
 “ nel again. From that point down to where I dug out
 “ my ditch it was a very slight channel, a little better
 “ than the place where I took it out ; it was a very
 “ slight channel though, with scarcely any bank. I had
 “ to confine it all the way along to get it to flow into my

"head-gate on Section 21; where I put in my head-gate
 "it widened out again, and made a large swamp in Sec-
 "tion 21, and that continued down to near the east
 "boundary of Section 20, and there formed a well de-
 "fined channel.

"Q. Did that well defined channel continue on
 "down Buena Vista Slough?

"A. Went all the way through at that time; *it is a*
"better channel now than it was then." (Fols. 98 to 101.)

R. L. DIXON, (for defendant,) speaking about
 crossing Buena Vista Slough at a point near the mouth
 of the Middle Branch, is asked:

"Q. Is that north of the Middle Branch of the
 "river?

"A. Do you designate that as the Middle Branch?
 (pointing to map H.)

"Q. What do you call that?

"A. I have always called that the North Branch;
 "there are some flat sand sloughs lying along north of
 "that—flat places; *I think there is not any slough going*
"from Kern River further north than that; I think it is
 "only in high water the branches overflowed there
 "near the mouth of it, and spreads out there in high
 "water; I know where what is called Gage Slough is;
 "I think that must be it (pointing it out on Map H);
 "that is north of what I call the North Fork of the
 "river, and when I speak of the North Fork of the
 "river, I don't mean the Gage Slough at all." (T. III,
 f. 493-4.)

Again he says:

"I crossed a channel there, what we call the North
 "Branch, designated on Map H in yellow.

"Mr. Garber—That is what we have been calling the
 "Middle Fork.

"The Witness—I don't know the names that these
 "streams were called; I have always called them my-
 "self, on the ranch, and designated them in relation to
 "my work as the North and South Branch; *those are*

"all the branches of the river that I consider were there."
(T. III, f. 504.)

On cross-examination, he says:

"I suppose that slough where it leaves the river, is
"25 or 30 feet wide, where it passes through Section
"20, a portion of it is a deep slough with perpendic-
"ular banks, was when I went there, now worn down
"by cattle, I suppose 20 steps wide in places, and nar-
"rower in others. Something like 20 yards wide."
(T. III, fol. 548).

"Q. How deep is it there?

"A. Four or five feet deep, perhaps in some places
"more than that. I think there are some places in
"that slough ten feet deep. I have a head-gate at
"the end of this slough. *When I first went there, below*
"*that point running west, there was no slough.* (T. III,
f. 549.) "*There was no water ever running in that*
"*slough except what I turned out of my ditch since I have*
"*been there*" (f. 551). "Where the Gage Slough con-
"nects with the river, I suppose it is a foot deep,
"hardly that. I have never seen any water run from
"the river into the head of that Gage Slough.

"Q. Have you ever seen any water run from the
"river into that slough in any way?

"A. Yes, sir.

"Q. When?

"A. When the river is high and overflows the
"banks between the old ranch ditch and that slough,
"it runs over the banks on what is known as the Stock
"place, in Section 22, and runs into the slough.

"Q. What is there, if anything, on the bank of the
"river at the mouth of that slough that prevents the
"water from running into it?

"A. The former owners of that land put a small
"levee across the mouth of it, right on the bank of the
"river. I added to it at one time. I don't know how
"high it is—2½ feet, I suppose, and about the width of
"the slough in length.

"Q. Is that levee high enough and long enough to

"prevent any water from running into that slough at
"all?"

"A. It could not go into the mouth of it except at
"very high water; it goes over the bank above it and
"runs into the slough." (Fols. 552 to 554.)

And on re-direct examination:

"Q. How is the bed of the Gage Slough, Judge,
"on the other side of the levee from the river?"

"A. *A stranger would pass that place without ever
"knowing he had passed any slough. It is all flat there;
"there is a little bank on the north side of it a short way,
"but in passing over the country a stranger would never
"know he had passed any slough. When the water rises
"in it 6, 8 or 10 inches, it flows to the south; it has no
"bank—is all flat; it runs out into the branch of the river
"again, the North Branch. Had that levee not been put
"there, in ordinary stages of water the water would not
"have run into the Gage Slough, no more than it would
"over the bank. Ever since I have been there, at high
"stage of water it would come in there, and it comes
"over the bank on both sides of it, above it and below
"it."* (T. III, f. 570-1.)

On re-cross examination:

"I think I said that the Gage Slough, where it leaves
"the river, was 20 or 30 yards wide—something like
"that.

"Q. How far did it continue going west that width
"before it spreads out?"

"A. The water flows right out of it at once right
"over there from that point on the south.

"Q. And that continues from that point how far?"

"A. Sometimes there is a little bank for 20 steps,
"and then there is no more; it is all spread out again
"to the south." (F. 585-6.)

L. L. DIXON (for defendant) says:

"I never considered Gage Slough a branch of the
"river." (T. IV, f. 727.)

These Dixons all lived at the Buena Vista Ranch, in the immediate vicinity of Gage Slough, and were for years thoroughly familiar with that slough. They each state that it is not a branch of the river. We deem it unnecessary to cite further testimony on the subject.

The South and Middle Branches of New River.

W. R. MACMURDO (for defendant):

"The course of the water in Kern River, from Tracy's Crossing down, is all of it continuous down Kern River until it reaches the forks on Section 23; there it divides, and a part goes down the South branch and part goes down the Middle Branch. That which goes down the South Branch continues in that branch down to Cole's Bridge, and empties into Buena Vista Slough at that point. The part that goes down the Middle Channel runs down to Section 28, near the line between Sections 28 and 27, T. 30 S., R. 25 E.; then it runs from there in a southerly direction to the South Branch, and continues in the South Branch down to the slough, and empties into the slough near Cole's Bridge." (T. IV, f. 1186-7.)

WALTER JAMES (for defendant):

"The river divides on Sec. 23, T. 30 S., R. 25 E. One branch goes southward through Sections 26, 27, 34 and 33, T. 30 S., R. 25 E., and across the line of Section 4, T. 31 S., R. 25 E., and discharges into Buena Vista Slough near the bridge; that is the South Fork.

"Q. Where does the Middle Fork flow?

"A. The other branch of the river flows through Sections 23, the south portion of 22, crossing the northwest quarter of Section 27, flowing thence south-

“ward, near the line between Sections 27 and 28 and
 “into Section 35, thence southwesterly to a point near
 “Cole’s Bridge, and there discharges into the slough;
 “that map is correct (referring to Map H).” (T. III,
 f. 171-172.)

Says he:

“I was from Cole’s Bridge to the mouth of the Mid-
 “dle Fork of Kern River; there was no water in the
 “Middle Fork; I was at a point on the river where the
 “water ceased flowing in the Middle Fork; this was
 “April, 1881; this point was near the line between
 “Sections 27 and 28, in Township 30 South, Range 25
 “East, north of the quarter post between those sec-
 “tions ” (f. 170).

S. W. WIBLE (for plaintiffs) says that at present the
 water running from Kern River into Buena Vista
 Slough runs through the south channel. (T. II, f.
 1806-7.)

GEORGE DAVIDSON (for plaintiffs) says that the
 water is now running to Buena Vista Slough through
 one fork, known as the South Fork. There is another
 fork, which is now empty, except a small amount of
 back-water, which enters it through Buena Vista Slough.
 (T. II, f. 1477.)

SOL. JEWETT (for plaintiffs):

“Q. Do you know where the waters of Kern River
 “empty?

“A. They empty right in at the bridge below the
 “lake into Buena Vista Slough.” (T. II, f. 248.) “I
 “was down at the mouth of New River two years ago,
 “and I was there before, at the time that the bridge
 “was located—the bridge that the county built. I
 “can’t fix the section; it was near Cole’s ranch.” (T.
 II, f. 254.)

JAMES DIXON (for defendant) in April, 1872, went
 to Tracy’s Crossing on the river. (T. III, f. 3.) At-

tempted to cross there, but getting mired, came out and went below to the South Branch, near the Alejandro place on Section 26, T. 30 S., R. 25 E. The water there was running south, and seemed fully as high as it was at Tracy's Crossing. It looked dangerous, and he was deterred from crossing it on account of the appearance of the water; there was a great deal of water and the current was very swift. (Fols. 4-5.) In November, 1872, (for date *vide* T. III, f. 11,) he again visited the country in the neighborhood of the Alejandro Ranch, and then crossed the South Branch—the same that he had turned back from before. There was a great deal of water there, and a very swift current; it was so deep it ran into his buggy. After crossing the South Branch he went to an old corral in Section 29, where he camped for the night; but in going there he found a great deal of water, a great number of small channels, all running south—running towards the lakes. The next day he crossed the Middle Branch, running through Section 29; found water there. "The stream was 'wide,' says he, '*but shallow and easily crossed*. I only 'remember it was not deep. I got there at night, and 'it looked like a formidable stream; and it was dark. 'It was quite wide at that point; perhaps 300 feet 'wide. I waited until morning, and crossed it without 'any difficulty. *I don't think the water was over a foot 'deep in it in the deepest places.*" (T. III, fs. 5 to 8.)

In 1873 Dixon built the Joyce Ditch from a point in Section 23, on the north bank of the Middle Branch, below where it diverges from the South Branch. (T. III, pp. 4 to 6.) Says he:

"In the spring, when the water was high, it flowed 'directly into the ditch without any trouble. During 'the summer we had to build wing-dams out into the 'river, and also to put in a dam in the South Fork of 'the river, which is a short distance above the head- 'gate. I put in this dam on the South Fork, at the 'point where it leaves the North Branch of the river. 'I put the dam in first in the summer of 1873." (Fols. 21-2.)

He says that the object of putting in this dam was to cause the water to flow into his ditch; that there was not enough water to flow into the North Branch without it; that at that time until he would divert enough to make it flow into the North Branch the bulk of the water went through the South Branch of the river; that, when he first put the dam in, there was a large stream of water running in the South Branch—a good stream of water. Says he: “The bulk of the water that was running down this river was going in the South Branch, where I put the dam in. There was some running in the North Branch; not enough to fill it; not enough to give me plenty of water in the ditch. I could not state exactly the amount. There was ~~was~~ not enough to fill my ditch to keep it full” (fols. 22 to 24).

Dixon says that he has frequently been along the points of the country between the head of the Joyce Ditch and where the North Branch of Kern River empties into Buena Vista Slough. (Fol. 24.)

“Q. Do you know which way the water of that river ran after passing at this point that you speak of in its natural flow through both channels beyond the point of separation?

“A. The direction of the North Channel, I think, is south of west.

“Q. I am not speaking of the direction, but where the water went to.

“A. It went into Buena Vista Slough; I could not say that I was ever right at the mouth at the time that the water was running out of this North Branch. From my knowledge of the country, I can say that the water would flow, and I have seen it flowing, into the lakes from these channels, until the lakes were full enough to make it go the other way. I have seen it flowing both ways.

“Q. After the lakes were filled up you say the water would flow the other way?

“A. That was always my impression of the country,

“that after the lakes were filled up it would flow north-
“west.

“Q. That the water would first flow then, as I un-
“derstand you to say, to fill the lakes, and after that
“flow northwest?

“A. That is my belief. I have seen the water flow-
“ing in that direction from those streams. (T. III,
fols. 26 to 28.)

Again, Dixon says: That in December, 1875 (for
date *vide* T. III. f. 44), he crossed Buena Vista Slough
at Tracy's Crossing—not the Tracy's Crossing he had
spoken of before, but the Tracy's Crossing on the
Slough (in Sec. 24, T. 30, R. 24, *vide* Map H.)
There was some water there then; but doesn't know
whether it was running or not; supposes it was; doesn't
recollect much about it, except that there was water there.
On that same occasion he saw the slough at Cole's
Bridge. There was water running there—running into
the lakes; a big head of water, a swift current towards the
lake. “I would like to say,” says he, “that there was
“an obstruction in the slough, and the current was very
“swift passing through under the bridge—the old
“bridge across the slough. There were men there try-
“ing to stop the water from going into the lake. I
“stayed there a few minutes, and went on to the San
“Emidio Ranch; I returned in a day or two, and passed
“by that place again. The water was not then running
“into the lakes; it had been stopped at the bridge. I
“did not see the water running in any direction there;
“it was standing. The water was standing at the
“bridge—no current. The water was standing on one
“side against the embankment; some water on the
“inside. (T. III, fols. 29 to 32.) When I returned
“from San Emidio at that time, I crossed Cole's Bridge
“and went east some distance, I could not tell exactly
“where, and then north, and crossed the south branch
“of Kern River again. Water was very deep; I con-
“sidered it very dangerous crossing; the current was
“very swift.

" Q. Whereabouts was that place? Was that the place that you referred to before?

" A. I think it was. It was near the Alejandro place." (T. III, f. 41.)

R. L. DIXON (for defendant):

" Early in January, 1876" (T. III, f. 498), "crossed Cole's Bridge" (fol. 499), "and went up the levee, east, three-quarters of a mile; then turned northward to go back to my ranch" (fol. 501)—"the Buena Vista Ranch, on Sec. 20, T. 30 S., R. 25 E." (fol. 489).

" Q. Did you cross any channel or any water?

" A. Yes, sir" (fol. 502); "I came to the South Branch; I found there a deep channel; the water was very swift—so much so that I objected to crossing it; we did cross it, however; the water was running towards Cole's Bridge" (fol. 503). "I then crossed what we call the North Branch—designated on Map H, in yellow" (fol. 504). "After reaching this branch colored yellow on Map H, we found water there and crossed it. I suppose the deepest part of it was a foot and a half. The deepest part was at the bank, and running out to the flat, where there was almost no bank. I don't think it struck the buggy axle, and from that it went down to nothing" (fol. 505). "We could see that the water was not deep, there was a current there—not much of a current; it was running along; I suppose it was 40 feet wide—may be 50; the average depth, I suppose, would be a foot to 15 inches. The South Branch, where we crossed it, was not so wide, but it was a great deal deeper and a great deal swifter; it was very swift and rapid; I should think the South Branch carried five or six times as much water as the other; it may be more than that; I had no means of measuring it" (fols. 506-7).

Again, Dixon says:

" In 1875 I found the water failing on the ranch, and I went up to the head of the (Joyce) ditch to see what

" was necessary to keep it there. I found nearly all of
 " the water flowing into the South Branch of the river.
 " There was very little flowing into what I call the North
 " Branch; not enough to fill my ditch—not enough to
 " come into it. There was not enough to run from that
 " point down the north channel to Buena Vista Slough;
 " it would be lost before it got there. I put in a weir
 " of brush, hay and sand in the mouth of the South
 " Branch, across the mouth of the South Branch, until
 " I turned sufficient water down the North Branch to
 " fill my ditch. There was a good deal of water run-
 " ning down the South Branch; more than necessary to
 " fill my ditch—to fill two or three of them; two or three
 " times more than the amount I turned in. I planted
 " stakes at the mouth of the South Fork, and made a
 " brush dam just above its mouth, so as to turn the
 " water into the other branch of the river, and turned
 " in sufficient quantity to answer my purposes. It was
 " a good deal of work. As I would begin, the current
 " would wash out my dam, you know, a strong current.
 " I attempted it two or three times, and I had to haul
 " hay up there to enable me to do the work quick. At
 " the head of the South Fork the water that went down
 " the South Fork was fifty yards wide; the depth was
 " over two feet; it was knee deep, running a strong cur-
 " rent, and when we could get a place filled up, it would
 " run in very rapidly and wash it out. The dam that I
 " put across the mouth of the South Fork did not re-
 " main there. The first high water that came on washed
 " it out. Whenever the water would come up near the
 " top of it, it would wash out. I think I have put a dam
 " in there every year. I have put a dam in at one point
 " or another, so as to turn the water into the North
 " Fork.

"Q. Whenever you went there in low water, did you
 " find the water running in the South Branch?

"A. Always when there was water, sir; at a low
 " stage of the water, the water would all go, if I per-
 " mitted it, into the South Branch. There has to be a
 " good stage of water, a fair stage of water to run into

“the North Branch—what we call a medium stage.
 “That has been the condition ever since I have known
 “it, at that point” (fols. 510-15.)

On cross-examination Dixon is asked:

“Q. You speak of putting obstructions into the
 “South Fork where it leaves the main river, just above
 “your head-gate, to throw more water into the North
 “Fork. Where would you commence?

“A. Sometimes at one point of it, and sometimes
 “at another; sometimes a little above the mouth on the
 “south bank of the river, and bring it down so as to
 “throw the current to the north bank of the river.

“Q. Would you extend that obstruction across into
 “the North Fork, and across the North Fork?

“A. No, sir; *my object was to throw the water into the*
 “*North Fork.*

“Q. Would you extend that a part of the way across
 “the North Fork?

“A. No, sir; not when I was damming the South
 “Fork.

“Q. Have you ever placed any obstructions of any
 “kind across the North Fork?

“A. Yes, sir; for the purpose of turning water into
 “the ditch when it was low.

“Q. You put this across the North Fork, too?

“A. I took out the ditch and turned it in. When I
 “had a ditch full of water, I would stop it there and get
 “it all in, making a ditch of the river bed. I think the
 “first time I put any obstructions into the North Fork
 “was in 1879. The North Fork makes a little island
 “immediately in front of the ditch, and I put it from
 “the bank of that island above. Made a wing dam to
 “throw the water into the mouth of the ditch. I would
 “force that on to the bank near the head of the ditch
 “there.

“Q. So, then, you made an obstruction clear across
 “the North Fork?

“A. Yes, sir. There was not water enough to fill
 “the ditch in low water. That obstruction that I put

“in the North Fork in 1879 was of brush, sand and
 “willow sticks. It only remained until the first flow
 “of water came to wash it out. It was a temporary
 “thing. Whenever the water would come these slight
 “obstructions washed away directly. It was simply
 “to turn the water into the head of the ditch when
 “it was low. I don't think I have put any obstruc-
 “tions across the North Fork since then. I think
 “there are no obstructions there now.” (Fols. 555 to
 559.)

WILLIAM SOUTHER (for defendant):

On or prior to March 3rd, 1874—for he was then on
 his way to Bakersfield, where he arrived on March 3rd,
 1874 (T. III, fol. 734)—Souther went from Tracy's
 Crossing, on Buena Vista Slough, in Sec. 24, T. 30 S.,
 R. 24 E. (marked on Map H “Old Tracy Ford), to the
 Alejandro place, in Sec. 26, T. 30 S., R. 25 E., and in
 doing so crossed the several branches of New River
 shown on Map H.

Says he:

“After crossing at Tracy's Crossing, I went in a
 “northeasterly direction. From the marks and indi-
 “cations on the map, I think I went to Section 19—
 “the south half, perhaps, of Section 19; then to the
 “north half of 20, and to the south half of 28, cross-
 “ing a cut or a branch leading from the central
 “branch, apparently, to the South Branch. From
 “there I went on into Section 27. Then I crossed the
 “East Branch, as I would term it, or south—whatever
 “it is termed here, the branch there runs in a south-
 “westerly direction—southeast to a branch that runs
 “along the line of the Alejandro ranch. I think that
 “the Alejandro ranch must have been on Section 26.
 “In going across there I crossed several channels, or
 “places where water had run. There was no water
 “except in these two. I don't remember that I crossed
 “any water except that.

“Q. By these two, which do you mean?

“A. I mean the two last—one in 28 and in 27. I

“ mean the one running down to and dividing 28 and
 “ 27.

“ Q. Which course did these two last channels seem
 “ to take?

“ A. These channels run in a southerly direction.
 “ *Before coming to those two, we crossed some dry channels*
 “ *that had sand in them—indications that water had run*
 “ *there.*

“ Q. Well, on this map there is, in the neighbor-
 “ hood of 19, shortly after leaving Tracy's Crossing, a
 “ channel marked. Do you remember crossing one
 “ shortly after leaving Tracy's Crossing?

“ A. Well, we crossed something of that character,
 “ perhaps several. I don't remember particularly about
 “ it. It has been some time. In going from 19, *the*
 “ *first channel that I remember is on Section 29—the Middle*
 “ *Fork. That channel was a dry, sandy channel at the*
 “ *time. There was no water running in it. Then we*
 “ *crossed the channel between 27 and 28, and that had water*
 “ *in it. There is where we bogged; right alongside of*
 “ *that water, bogged the teams down. I perhaps would*
 “ *not remember it so particularly had it not been for*
 “ *that. There was considerable water running there.*
 “ *Where I crossed it it was running nearly a due south*
 “ *course.*

“ Q. Then, the last channel that you crossed, did
 “ you find much water?

“ A. Yes, sir. The most of the water we crossed
 “ after leaving the main Buena Vista Slough at Tracy's
 “ Crossing, was at that last channel. Perhaps three or
 “ four times as much water was running in this channel
 “ at the time I crossed; that is the last channel; the
 “ one near the Alejandro ranch. The house was some
 “ distance in the field. All the water seemed to be
 “ running southward. It was all running down in that
 “ direction. The first stream was running nearly due
 “ south; the other was running in a southwesterly
 “ course. I have since seen those channels where I
 “ found the water, and I know where they empty.
 “ They empty in at Cole's bridge, on the Buena Vista

"Slough, into the Buena Vista Slough." (Trans. III, fols. 629-634.)

C. L. CONNER (for defendant) also crossed these several branches of New River in March, 1874, following substantially the same route as Souther had previously done (T. III, pp. 289-9).

In going from the Buena Vista Ranch to Keith's place, just southwest of the Alejandro's place, Conner says that after leaving the Buena Vista Ranch he went two and a half to three miles before he crossed any water (fol. 911); that he then came to water which had the appearance of being a river, about eighty feet wide and three and a half or four feet deep, running rather rapidly and *in a southerly direction*; that after crossing the stream he then came to another having the same general appearance as the first, also running in a southerly direction (fol. 913-14). Says he:

"The second contained perhaps more water. It was "about the same depth as the first; between three and "four feet, but some wider. It was running rapidly "and in a southerly direction (fol. 914). The streams "were about a quarter of a mile apart, I should judge. "I crossed both of them before I reached Keith's "place. The second one went through a portion of "Keith's place, perhaps within two hundred or three "hundred yards of his house" (fol. 914).

L. L. DIXON (for defendant):

In March, 1877, going from the Buena Vista Ranch to the Lake Ranch, on Sec. 11, T. 31, S., R. 25 E., Dixon ^{crossed} covered the several branches of New River, shown on Map H (T. IV, p. 181), says he:

"I crossed the central branch; crossed it somewhere "in Section 28; *there was then no water in it at all* (fols. 723-4.) "I then crossed the two southern branches "along in Sections 33 and 34; found water in both of "them; think it was running in the extreme southern "branch; there was water in the other one; would not

“be positive whether it was running or not ; if it was
 “running it was running a slow current. The extreme
 “southern branch had running water in it. (fols.
 724-5.)

“Q. Now, when you crossed that central branch,
 “Mr. Dixon, you said there was no water in it. What
 “sort of a channel was that?

“A. It was a channel tolerably wide, with flat banks.

“Q. How deep was the bed of the channel below
 “the surrounding country—below the banks?

“A. Well, where I crossed it I don't think it was
 “more than six inches ; twelve or thirteen inches in the
 “deepest place.

“Q. How deep were the banks of those two forks of
 “the southern channel?

“A. They were pretty steep banks. (Fols. 727-8.)

“Q. Mr. Dixon, will you look at this Map ‘H.’
 “There is a channel there connecting this middle
 “branch or central branch with one of the south
 “branches. Have you ever seen that?

“A. Yes, sir.

“Mr. McAllister—You mean that cross channel?

“A. Yes, sir.

“Q. When did you first see that?

“A. Three or four years ago ; I could not name ex-
 “actly the time: *I used to go up there to go in swimming.*

“Q. *To go in swimming in that channel?*

“A. Yes, sir.

“Q. *Why would you go there to swim?*

“A. *It was a nice deep place to swim in.* I used to
 “hunt ducks up there some times in the winter.

“Q. You have known that, you say. How many
 “years ago did you notice it?

“A. Three or four years ago ; I don't remember ex-
 “actly when.

“Q. Did you know that in 1877?

“A. Yes, sir ; I think it was as early as that, if not
 “earlier. (Fols. 728-30.)

On cross-examination Dixon is asked:

“Q. You say that you saw that cross channel run-

"ning from the middle branch to the southern branch
 "as early as 1877?

"A. Yes, sir.

"Q. How large was that cross channel when you
 "first saw it?

"A. About the same size as it is now.

"Q. The first time you saw it, it was as large as it
 "is now?

"A. It might have been a little smaller; I didn't
 "measure it.

"Q. What proportion of the water ran in the middle
 "branch at that time, when you first saw it?

"A. Well, sir, unless in extreme high water in the
 "middle channel, I never saw water in it until 1878.

"Q. What is that?

"A. *Unless there is very high water, no water runs in
 "the middle channel as long as I have known it.*

"Q. When did you last see water in the middle
 "channel?

"A. I saw it there in 1878, in high water.

"Q. It runs there in very high water, don't it?

"A. *In very high water.*" (Fols. 774 to 776.)

H. NOBLE (for defendant):

"Was at Cole's Bridge in the Spring of 1874 or '75;
 "can't say positively which; there was a bridge con-
 "structed there at that time." [Must have been 1875,
 "for the bridge was not constructed prior to Decem-
 "ber, 1874. *Vide* T. III, f. 321.] "The water was
 "quite high about where the bridge was. There was
 "quite a strong current running towards Buena Vista
 "Lake. All the water I saw passing through the chan-
 "nel was flowing down towards Buena Vista Lake."
 (T. IV, f. 197-8.)

C. G. JACKSON (for defendant):

"In the Spring of 1871, April or May" (T. IV, f.
 528), "crossed the South and Middle Forks of
 "New River; there was more water in the South Fork
 "than in the Middle Fork. The water was running;

" it ran down in the slough just north of Buena Vista Lake.

" Q. What direction did the water run then?

" A. The water was running into Buena Vista Lake." (Fols. 529-531.)

" Q. Have you been around through Buena Vista Slough and in the vicinity of these lakes you refer to, where these branches empty into the slough, at other times?

" A. Yes, sir.

" Q. During what years?

" A. During 1872 and 1873 I have seen the water running from the river there. I was there in 1875.

" Q. In 1872 and 1873, after reaching the slough, which way did the water run?

" A. It ran into Buena Vista Lake.

" Q. You say you were there in 1875?

" A. Yes, sir.

" Q. How was it in 1875?

" A. It was running into Buena Vista Lake from the south side. I was on the south side of it—the southeast side of it." (Fols. 531-2.)

On cross-examination:

" Q. What season of the year 1872 and 1873 were you at Buena Vista Slough?

" A. In 1872 it was along about March or April; in 1873 I think it was in the Spring, about the same time; a little later, I think. It may have been as late as May." (Fol. 538.)

E. H. DUMBLE (for defendant):

" In December, 1871, was where Cole's Bridge is now. On that trip I did not go north of the South Branch of the river. There was very little water there at that time. I don't think it was running at the time. It might have been running. There was no perceptible current that I could see. I was next there in January, 1872. The water was running. There was some considerable water. I was there

" hunting and fishing. I went up to about the Middle Fork, following along the east side of the slough. The water was running. It was running down into Buena Vista Lake, and there was a considerable body of water running.

" Q. Did you see any running in any other direction?

" A. I did not, no, sir; that water was running towards Buena Vista Lake.

" Q. Were you then down as far as the Middle Fork?

" A. Yes, sir; up, rather, north.

" Q. That is, as the water was running then?

" A. Yes, sir; I was there next on the 5th of July, 1873, at Cole's bridge, in that vicinity. We were hunting and fishing. There was very little water there then; it was running—running south. We did not go north of the South Fork on that trip. The water was running towards Buena Vista Lake. I was there in January or February, 1876, at Cole's bridge, there was water there then." (T. IV, fols. 1041 to 1043.) *"In 1876 the water was backed up on the north side of the bridge; there was a weir and dam built in the bridge. The water was dammed up. I should think it was four feet higher on the north side than it was on the south side—four or five feet difference"* (fol. 1045).

W. McFARLAND (for defendant):

" First saw Buena Vista Slough, about Cole's Crossing, in 1872, late in the summer or fall—about August or September. There was considerable water there; at that point it was flowing south.

" Q. Did you see any water at that point flowing in any other direction?

" A. I saw water at the Tracy Crossing. If it was running any way it was running north; but as near as I can recollect now, it was very still. My recollection is, that *the water was not running at Tracy's Crossing; was still; but was running at Cole's.*" (T. IV, fols. 1467-8.)

D. G. McLEAN (for defendant):

“Q. Do you know the several branches of Kern
“River or New River, generally denominated the
“North Branch or North Channel, Middle Channel and
“South Channel?

“A. Yes, sir; I have been across them repeatedly
“for several years. I think I was across there in
“1875, 1876, 1877 and 1878, 1879 and 1880, nearly
“every year, I think, since I have been living down in
“that portion of the country. I have been at Cole’s
“bridge. I have seen water in these branches, and I
“have crossed them when they were dry, and at all
“stages of water almost, when they were passable at
“all. I crossed them in 1875, I think. in the spring,
“I think. I found water in them very full. I crossed
“them somewhere near the east line of Sec. 21, I think it
“is. It was in Sec. 21, T. 30, R. 25, a little above—east
“of the Buena Vista ranch. I started from there and
“I went in a southeasterly direction. In going across
“there I crossed the North Channel. There was very
“little water in the North Channel. I had no difficulty
“in crossing it. The Middle Channel I crossed with-
“out much difficulty. The South Channel I crossed;
“it was very deep, and had, as I remember, a very
“swift current. I had difficulty in crossing it; the cur-
“rent was very swift; it was almost swimming. At that
“time I think the bulk of the water was going in the
“extreme South Channel. That was in the Spring of
“1875. I crossed it again later in the season of 1875,
“at exactly the same place. There was much less water
“in all the channels. There was very little water in
“the North Channel. The Middle Channel had a shal-
“low stream. The South Channel had a current, and
“was running through a more defined bank. I thought
“the South Channel carried the most water. I have
“crossed there when the Middle Channel and the North
“Channel were both dry, and there was water in the
“South Channel, and it was flowing with a considerable
“current. I think that was the same year, at a later
“period. I passed there several times in subsequent

“years, when I found no water in any except the South
 “Channel, and at such times the water would be flow-
 “ing in the South Channel. It flows in the South
 “Channel in a southwesterly direction. It empties into
 “the slough at the head of Buena Vista Lake.” (T.
 IV, f. 1530-34.)

“Q. About these branches of New River, the South
 “and Middle Branch. What is the course of that water
 “after it reaches Buena Vista Slough?

“A. It runs into Buena Vista Lake when there is
 “an ordinary stream; when there is a very heavy stream
 “of water it overflows. It runs into Buena Vista Lake
 “from the Southerly Branch.

“Q. Did you ever see the dam there at Cole’s
 “Bridge?

“A. Yes, sir; I have seen a levee clear across there.
 “The first time I saw it was about the time it was com-
 “pleted, in 1877 or 1878. I understand the effect of
 “that was to turn the water from Buena Vista Lake,
 “down through the swamp in the direction of Tulare
 “Lake, northward.

“Q. When you said the water flowed into Buena
 “Vista Lake, did you mean whether the dam was there
 “or not?

“A. No, sir; if the dam was gone. My answer did
 “not mean when the dam was there. I saw it when
 “there was no dam there. Then the water went to-
 “wards the lakes. When the dam was there it had to
 “go in the other direction.” (Fol. 1540-41.)

SOUTHER (for defendant):

“From my knowledge of New River and my experi-
 “ence here in this county, New River—all the branches
 “that I have described, and which we crossed there”
 (the Middle and the South Branches, *vide* T. III, 629 to
 634), “came down and ran in right at that point above
 “the bridge, or near the bridge, within a few feet of it,
 “into Buena Vista Slough. It turns and runs back
 “into the lake whenever the water is low enough in
 “the lakes, of course, to allow the water to run.”
 (Fols. 665-6.)

T. W. BARNES (for plaintiffs) was constantly about that portion of Buena Vista Slough from 1867 to 1879, in fact from the formation of New River to the present time. (T. II, pp. 333-4.) He says:

"I know where the waters of New River enter Buena Vista Slough. It goes into the Slough at three different points; the fourth point runs into the east side of Buena Vista Lake; starting from Section 24 it leaves New River at Tracy's Crossing.

"Q. We will take the channels as we come to them, going down the river you say there is a channel at Section 24 that runs into it?

"A. That goes through the Lake Ranch into the head of the lake; the east side of the lake; when the water begins to run over the banks of the river, it takes this channel.

"Q. Passing down from that channel what channel will you find next?

"A. Find next what is called the South Fork channel; it runs into it near Wible's; the swamp land in there. There is a levee across Buena Vista Slough and they have a weir.

"Q. Where does that water enter on to or reach Buena Vista Slough?

"A. When it comes down there the same as this one the lake was dry and the slough was low; it empties into the slough and runs up towards Buena Vista Lake.

"Q. Then what channel do you come to after that last channel?

"A. You come to what is called the Middle Channel; that goes into the slough also.

"Q. Where did the waters that go through that channel run after reaching the slough?

"A. The most of the time it runs up the slough and into the lake until the lake becomes full.

"Q. *From that middle channel?*

"A. *Yes, sir; a portion of it may go below. Until the lakes fill up it runs into the lakes.*

"Q. Where does the water run that runs in this

“third channel that you speak of?” (Gage Slough.)

“A. It runs into Buena Vista Slough also.

“Q. After reaching Buena Vista Slough, where does it run?

“A. Its natural course is northward towards Tulare Lake and Weed Island.” (T. II, fols. 1348 to 1354.

Plaintiffs may urge upon your Honors, that Barnes did not mean that the waters of the Middle Branch of New River flowed to the Lakes after reaching Buena Vista Slough. They will doubtless contend that at a subsequent period Barnes attempted to explain his testimony as to this Middle Branch. But your Honors will see, from a mere perusal of his testimony, that the *explanatory* statements of Barnes are not only false in themselves, but were the result of some “outside influence.” When he was first examined as to the course of the waters of the several branches of New River, he was questioned particularly as to the Middle Branch, and having answered that “Most of the time it ran up the slough and into the lake,” he was again asked, “From the Middle Branch?” “Yes, sir,” said he; “a portion of it may go below; until the lakes fill up it runs into the lakes.” Now, let us see what his explanatory statements are and how they happen to be made. We quote from the Transcript:

“The Witness—I understand there is some mistake in the way my testimony was in regard to New River emptying into the slough down there. If I said it was the Middle Fork emptying in above, and running in towards the bridge, I meant the main channel of the river, north of the Middle Fork of the North. There is where the river formed a sand-bar in 1867, across the slough, at the main channel. All of the water from that sand-bar runs into the lake, toward the lake. The main channel of New River emptied in at this dam, which stops the slough, and the water goes down the slough, and all of the other water runs towards the lake.

“Mr. Houghton—Q. Did you say that the water in
“the South Fork at that time, in 1876, when the sand-
“bars were formed, ran into the lake?

“A. Yes, sir; but the South Fork and little sloughs,
“making off from the river, run into the lake. The
“other main fork of the river runs north, towards
“Tulare Lake. There is a sand-bar forming right at
“the south side of where it empties into the slough.

“Q. Where the middle or large fork empties into
“the slough?

“A. Yes, sir.

“Q. You call the middle fork the main fork of the
“river?

“A. Yes, sir. I have not been there for two months
“and over. But when the river opened its channel,
“the main fork—the main body of the water—went
“north, and the balance of those other little streams,
“the South Fork, ran into the lake, on account of that
“sand-bar—of the sand-bar.

“The Court—That is an explanation of your former
“testimony?

“A. Yes, sir.

“Mr. Garber—Who suggested to you that there was
“any mistake in your testimony?

“A. I don't know; I heard it on the street that my
“testimony did not corroborate some others, and I re-
“member what they told me— that I had got the Mid-
“dle Fork for the North Fork or South Fork.” (T.
IV, fols. 154 to 157.)

We submit that his explanation is both unintelligible
and false.

J. PENSINGER (for plaintiffs):

“Have you ever been down to the mouth of New
“River?

“A. Well, I don't know; I have been all along. I
“have been past the mouth of it; I have been along the
“opposite side from the mouth” (T. II, f. 1279,)
“and have crossed all the branches close down by the
“slough.

"Q. Where did the water of that river" (New River)
"run to?"

"A. Well, I have seen it running south, and I have
"seen it running north. I saw it running south, I think,
"in 1874, into the Buena Vista Lake.

"Q. Was it all running into Buena Vista Lake then?"

"A. I could not say that. It was all running in
"that was running by there.

"Q. All that you saw was running into the lake?"

"A. Yes, sir." (Fols. 1281-2.)

Even CROCKER (plaintiff) himself states that the waters from the Middle Branch ran into Buena Vista Lake when the lake was low, but being promptly checked and told by his counsel that those waters went the other way, he seems to realize that in running them away from instead of towards his lands he is swearing away the very foundation of his case, and accordingly turns the water north instead of south. He was asked by Mr. Houghton:

"Q. How many forks does the river form before it
"empties into Buena Vista Slough?"

"A. It had three forks when I saw it last there. It
"had two when I first knew it. Nearly all of the water
"was in one.

"Q. In which one was the water?"

"A. It was in what is now called the Centre Chan-
"nel.

"Q. What was it then? You say it is now the cen-
"tre channel; what was it then?"

"A. It was then about the only channel.

"Q. Was it the north or the south channel?"

"A. It was the north channel.

"Q. Where does the north channel empty into
"Buena Vista Slough? That is, the channel which is
"now the centre channel, and which was formerly the
"north channel?"

"A. It empties in a little north of where the bridge
"was, and about, I should judge, a quarter of a mile,
"perhaps half a mile, north of where the south channel

“empties into it; but I am not positive about that.

“Q. Now, when you first saw water—the main body of
“the water in this north channel, after the water reached
“Buena Vista Slough—which way would it run?

“A. When the lake was at a low stage the north channel
“ran into Buena Vista Lake.

“Q. THE NORTH CHANNEL RAN TOWARDS TULARE LAKE?

“A. The south channel.

“Q. I am speaking of the north channel?

“A. It ran north.” (T. II, f. 523 to 526.)

Now, Crocker knew perfectly well what he was saying when he stated that the North or Middle Branch ran into Buena Vista Lake. There is too much detail about his statement to permit for a moment the supposition that he was referring to the South Branch. He had previously said that when he first knew these forks *nearly all the water was in the North, now called the Centre Channel, which was then about the only channel*, and when asked which way the water in the North Channel would run at the time he first knew it—that is, when it constituted “about the only channel”—he meant what he said: *When the lake was low the North Channel ran into Buena Vista Lake.*

Obstructions at Cole's Crossing.

N. R. WILKINSON (for defendant):

“The bridge at Cole's was built in December, 1874,
“or January, 1875. A levee was also built connecting
“with the bridge; the levee was commenced at the
“same time as the bridge, and was finished some time
“in the Summer of 1875.” (T. III, f. 321-2.)

F. P. MAY (for defendant):

“In September and October, 1875, I went down to
“Buena Vista Slough and worked with Baker & Lundy
“in digging a grade for the county; we were taking care
“of the roadway on the east side of Buena Vista Slough;

" the work was done on Cole's Bridge, Cole's Ranch;
 " that is south of the slough; the work consisted of
 " scraping and building grades, building embankments
 " and roadways; at that time my camp was on the west
 " side of the slough, and they worked on the east side;
 " I had occasion to cross the slough during those two
 " months, to and from the work, three times a day; I
 " crossed it north of and near Cole's Bridge; there was
 " no water in the slough at the time I crossed it; in
 " these two months it was dry land." (T. III, f.
 116-17.)

WM. SOUTHER (for defendant):

" December, 1875, I sent a man by the name of Ober
 " down to Buena Vista Slough for the purpose of putting
 " a dam to the south side of the county bridge, on the
 " township line. The county bridge was situated on
 " the township line between 30 and 31, and across
 " Buena Vista Slough; that was at Cole's, or Cole's
 " Bridge, as it is called. December 26th I sent Ober
 " there; I constructed a levee there, and built a dam
 " across the slough to keep the water from going back
 " into the lake. The water that emptied from Kern
 " River through that channel that I described a little
 " while ago, flowed back into the lake, and my object
 " was to stop that flow; I stopped it for a time. That
 " dam was completed in January, 1876; I mean the dam
 " at Cole's Crossing. Prior to the construction of this
 " dam at Cole's Crossing, I went down there to the
 " place where it was constructed; there was water
 " there then; it was running to the lake--was running
 " into the lake, and that was what led me to the con-
 " clusion that the dam would stop it. The dam was
 " completed in January, 1876, and remained for a time--
 " until March.

" Q. What became of it in March, 1876?

" A. It broke. I cannot tell you how it broke; I
 " suppose the water broke it. That was the supposi-
 " tion, at least. The water raised outside five or six feet
 " higher than it was on the lake side, and the dam gave

“away, and the bridge sunk in the middle. After it
 “broke I did not reconstruct it. When I constructed
 “that dam, I constructed it south of the bridge. There
 “was a road running across this bridge—the county
 “road; it followed from the uplands clear through on
 “that township line where the road was laid out to go
 “on the west side. There was a levee there, previous
 “my constructing it. There was a levee thrown up from
 “the end of the bridge back to the high land. There
 “was some thrown up on both sides. The west side
 “came in further, near the bank—the bluff bank.

“Q. How far back from the bridge eastward did that
 “levee extend?

“A. There was more or less work done for a mile.”
 (T. III, fols. 655 to 659.)

G. K. OBER (for defendant):

“Q. Do you know anything about where Cole’s
 “bridge is?

“A. Yes, sir; I have been there. I was first there
 “in December, 1875, putting in a dam across the slough.
 “I was in the employ of W. H. Souther.

“Q. What did you put a dam across the slough for?

“A. To keep the water from going into Buena Vista
 “Lake from Buena Vista Slough.

“Q. How was it running when you went there?

“A. It was running south into the lakes.

“Q. How did you put the dam in?

“A. By getting turf and throwing it off the bridge
 “into the water. There was a bridge there then.

“Q. Was there any levee connecting the bridge
 “with the high land at that time?

“A. There was a levee running something over a
 “mile, nearly east—in an easterly direction from the
 “bridge. There were five men at work on this dam at
 “the time I was there.

“Q. Was the dam easily constructed?

“A. No, sir.

“Q. How long were you at it?

“A. In the neighborhood of one month.

“Q. How high did you carry it above the mark of the water when you first constructed it—about?

“A. I think between six and seven feet.

“Q. Did you succeed in perfecting a dam and keeping the water out?

“A. We stopped the water at that time. (T. III, f. 1149 to 1152.)

WILKINSON :

“In March, 1876, the bridge washed away, and we were sent down there by the Board of Supervisors to see the condition of the bridge and make a report.”

(T. III, f. 328.) “There had been thrown up across the slough, right on the south side of the bridge, a dam of sod, and this dam had given way in the place. “probably ten or twelve feet wide, and the water was going through there with terrible velocity. A large volume of water was there running south into the lake. It was three or four feet higher on the north side than it was on the south. The water was running through the levee at a point before we got to the bridge, at the east end of it; it had broken through in several places. I have no idea of the flow of water passing through there; but there was a good large stream. The most easterly break was probably a mile or a mile and a quarter this side of the bridge” (fols. 334 to 336).

WILLIAM McFARLAND (for defendant):

“I saw Buena Vista Slough at Cole’s Crossing in the spring of 1876. I was appointed by the Board of Supervisors to go down and examine that levee and bridge there, to see what caused the damage. N. R. Wilkinson was appointed with me. We made an examination of that bridge, pursuant to that order of appointment, and made a report of our examination. (T. IV, f. 1481.)

“Q. What caused this injury to this bridge, according to your observation at that time?

“A. The dam being placed across that Buena Vista

“Slough and obstructing the water from running into
 “the lakes. It stopped the water from running south
 “into the lakes. We found that Souther was the man
 “that caused it to be done. He had put a dam across
 “and turned the water away, obstructing it from run-
 “ning south into the lake, and this had caused the
 “injury to the bridge by ponding the water up on the
 “north side.

“Q. How did that happen? Did it interfere with
 “the natural force of the water, that dam?

“A. Yes, sir; it kept the water from running into
 “the lake. The way it always used to run at that
 “point.

“Q. Was that the natural course of the water to
 “run into the lake, at the time that dam was con-
 “structed?

“A. Yes, sir; it broke through and run over, and
 “caused the damage to the bridge.

“Q. How high did you observe the water ponded
 “up on the north side of that point, or that it had
 “been?

“A. I think it was somewhere between three and
 “four feet higher on the north side than it was on the
 “south side.” (Fols. 1484 to 1486.)

JOHN O. MILLER (for defendant):

“I have lived down on Buena Vista Slough, on Sec.
 “24, T. 30, S. R. 24. I went there the 25th day of De-
 “cember, 1875, and lived there until April, 1876.

“Q. Did you have occasion to notice the water
 “rising in the river or not in the spring of 1876?

“A. Yes, sir; there was, and also in the slough. It
 “flooded a part of the crops that I had in on that oc-
 “casion by the rising of the back water from Buena
 “Vista Slough. The cause of that was that there was
 “more water than the slough would carry, and it flooded
 “the adjoining lands. This was in March, 1876.
 “There was more water come down the river than
 “Buena Vista Slough would carry. There was a dam
 “across the slough by the county bridge, or Cole’s
 “bridge, and the water could not get through there.

“Q. Do you know whether it dammed up on the north side of that levee and dam—whether the water banked up on the north side?

“A. Yes, sir; it backed up on the north side; it must have been five or six feet higher than it was on the south side.

“Q. Did you take any steps to relieve that condition at that time?

“A. Yes, sir, I did. I got some giant powder to blow out the dam with, but before I blew it out the dam bursted. I suppose the pressure of water on it was what bursted it. After it bursted the adjoining lands were relieved of the overflow. I saw the water pass in through there after it burst in considerable quantity. It was going south in that slough that the bridge was on, towards Buena Vista Lake, in a very considerable quantity. It was not exactly full, but it was rushing through with considerable incline by the bridge. The bridge had caved, and it was rushing under that with considerable force. The washing away of that obstruction relieved the land from the overflow. I don't recollect within what time exactly. The water did not remain long enough to kill the grain it was on. I suppose it must have been two or three days that it was on there. It was a speedy relief. The relief was so quick that it didn't kill my grain.” (T. III, fols. 793 to 797.)

FINDING 68: * * * *In the fall of 1877 the Kern Valley Water Company reconstructed the dam at Cole's, and in connection therewith, constructed a levee extending westward to the bluffs or high ground, and running eastward from said dam about a ^{mile}~~mile~~ and a quarter.* * * *

This fact is not disputed.

S. W. WIBLE (for plaintiffs):

“In 1876 I was employed on the works at the slough—employed by Mr. Livermore. He was at that time acting for the Swamp Land District, No. 121.

“ Afterwards I was employed by the Kern Valley Water
 “ Company, which, I believe, was an incorporated com-
 “ pany. I was Superintendent of the works—of the
 “ canal. At that time I had charge of the building of
 “ the canal. I had nothing else to do for that district—
 “ nothing but to build that canal, or superintend its
 “ construction. I had nothing else to do for either the
 “ Swamp Land District or the corporation, except su-
 “ perintending that branch of the business and works;
 “ that general business; the whole thing.

“ Q. What was the whole thing? What did it con-
 “ sist of?

“ A. Well, the construction, and the general man-
 “ agement of the whole thing.” (T. II, fols. 1840-41).

“ Q. During all that time, from 1876 to the present
 “ time, for either one or the other of those companies
 “ or employers, didn’t you do anything else except the
 “ tending to this canal?

“ A. It was all in one connection with that work,
 “ sir. I didn’t consider there was any other work not
 “ in connection with that canal.

“ Q. Was there not a dam put at Cole’s Crossing?

“ A. There was a dam put in at Cole’s Crossing, in
 “ connection with it. I consider that the same work,
 “ in connection with it. That was all done at the same
 “ time and under the same administration. That was
 “ built in 1877.

“ Q. Why do you say you considered the dam the
 “ same as the canal?

“ A. That was the same swamp land district. That
 “ was within the swamp land district—that dam was.

“ Q. So was the canal?

“ A. I don’t know. It is not in the swamp lands it
 “ is constructed, but was for the purpose of the
 “ reclamation works.

“ Q. What reclamation works?

“ A. Well, that canal.

“ Q. How was the dam for that purpose?

“ A. That dam was to prevent the water from over-

“flowing the lands, and also to let the water out in case
“they did overflow.

“Q. Let it out of where, and into where?

“A. These lands surrounding Buena Vista Lake.

“Q. This dam was to let the water out of Buena
“Vista Lake?

“A. Yes, sir; or to let it in—either way. It was
“both to keep it from going in and to let it out.

“Q. You built the dam there to keep it out?

“A. Yes, sir.

“Q. You didn't build the dam there to let it in,
“did you?

“A. Yes, sir; if they wanted it in there, to let it
“in.

“Q. How did the dam assist in letting water into
“the lake?

“A. I had constructed a head-gate there—a head-
“gate in the dam, in the levee.

“Q. But without any dam there at all, the water
“would have gone in, wouldn't it?

“A. Yes, sir; probably more than we wanted.

“Q. The dam in no way assisted the water to get
“into the lake?

“A. No, sir; nor the head-gate, either.

“Q. Then you don't mean that you built that dam
“for the purpose of making the water go into Buena
“Vista Lake? You only built it to keep it out, didn't
“you?

“A. Yes, sir; to keep it out, and if it got in, so as
“to let it out.

“Q. How would it get in there if you built a dam
“to keep it out?

“A. Well, not at all. It didn't get in enough to
“run out.” (T. II, fols. 1843 to 1848.)

“Q. Why was it that you wanted to build this dam.
“so as to keep the water from going into Buena Vista
“Lake at Cole's Crossing there?

“A. Well, the swamp lands bordering on the lakes.

“Q. Was the object, then, to reclaim the land—to
“keep the water off the land on Buena Vista Lake?

"A. Yes, sir; around Buena Vista Lake.

"Q. Was that the only object?

"A. Yes, sir; to reclaim those lands.

"Q. Was not the object to make the water go down into this canal that you were building, instead of going into the lakes?

"A. You could not allow it to go on to the lands and reclaim them at the same time.

"Q. Was not that the object?

"A. Yes, sir.

"Q. *The object was to make the water go down and follow this canal, or get into this canal of yours down from your headquarters towards Tulare Lake.*

"A. Yes, sir; to prevent the water from running into "Buena Vista Lake" (fols. 1852 to 1854.)

We will see from the testimony of Macmurdo and McFarland that the only purposes of this dam was to keep the water from going to the lakes, and to turn it northward from the dam.

After describing how the dam was constructed, Wible says;

"The first time when that work was so completed as to prevent the water from flowing through from either way, was in November, 1877. I then shut the gate.

"Q. How long did it continue in that condition so as to prevent the water running through?

"A. Water could flow through *when it rose sufficiently high to run over the top boards. It did run over.* I forget just how long, till the high water in February, 1878, knocked out the gates on one side. From November, 1877, to February of 1878, it kept the water from going through there at all.

"Q. And the first water that came broke it down?

"A. Yes, sir. Well, no, sir; not the first water.

"Q. Then there was water that could have gone through if it had not been for that gate?

"A. Yes, sir; water came down there in January, 1878.

"Q. How high did the water have to get before it
 "could get over?

"A. Well, I had the gate up. I think the water
 "run over, and then I put in more boards in the gates,
 "and raised the water higher. That was in January,
 "1878, I put the boards in. I put enough boards in
 "there so that it did not run over until the flood came
 "there. I should think *the water would have to get*
 "SEVEN feet high before it would run over after I put the
 "last boards in; or probably not more than six feet
 "above the water line, after I constructed the gate.
 "I think about 12 feet of water stood on top of my ground
 "floor.

"Q. When the flood of 1878 came and broke that
 "dam, which way did the water come, the flood to
 "break it down?

"A. It came down Kern River.

"Q. It went south?

"A. Part of it went south after it broke, and flowed
 "through south into the lake. (Fols. 1926 to 1929.)
 "After the break I closed it up. Since February, 1878,
 "no water has got out of the lake into the slough.
 (Fol. 1931.)

"Q. You have never allowed any to go in since
 "then?

"A. No, sir. Well, yes, I let it go in since that.
 "There was some water went in in 1878, but not enough
 "to fill the lakes. The lakes never got so full in 1878
 "that the water ran out again.

"Q. How was it in 1879?

"A. No water flowed.

"Q. What was the reason?

"A. No water in there to flow out.

"Q. There was no water coming down the river in
 "1879?

"A. There was little at times. It did not go into
 "the lake. *We had it closed up then and turned the*
 "*water north, whatever came.* Had a dam across, so
 "the water could not go in. There was some water
 "went into the lake by a break in 1880 in the Buena

“ Vista levee. The break was not where the head-gate
 “ was—it was just above. It may have been three-
 “ fourths of a mile from the gate east. The water ran
 “ in there in 1880, but not enough to fill the lakes. I
 “ repaired that break.” (Fols. 1932 to 1934.)

J. C. CROCKER (for plaintiff) says:

“ The levee was built across the slough at Cole’s in
 “ 1877. I saw them building it. Mr. Wible had the
 “ building of it. I think he was the General Superin-
 “ tendent of the Kern Valley Water Company.” (T.
 II, fols. 650-1.)

“ Q. What effect did the building of that levee have
 “ upon the water flowing down through Buena Vista
 “ Slough?

“ A. *It would have the effect to check the water from
 “ going into Buena Vista Lake.*

“ Q. So long as it was intact and complete, it would
 “ prevent any water from going into Buena Vista Lake,
 “ wouldn’t it?

“ A. That would depend upon the stage of water in
 “ the river.

“ Q. At all stages of the river?

“ A. No, sir.

“ Q. If that dam had not broken—had been kept up
 “ as first built—wouldn’t it have kept all of the water
 “ out of the lake?

“ A. It would have had to run it clear up above
 “ Bakersfield.

“ Q. Why?

“ A. Because, when it gets more water than it will
 “ carry, the river overflows the banks.

“ Q. Since that time there has never been such a
 “ stage, has there?

“ A. Yes, sir; one year.

“ Q. If that dam was complete and unbroken, has
 “ there ever been a time when it would not have kept
 “ all of the water out of the lake?

“ A. Yes, sir; I think so—in 1868.

“ Q. The dam was not thought of then?

"A. No; but I say the river at that time carried enough water.

"Q. I am asking you about since the dam was built.

"A. I beg your pardon. I have seen the water run across there.

"Q. You have never seen such a stage of water since the dam was built that that dam would not have kept it out?

"A. Yes, sir; in 1880, I think."

"Q. So much water came down the river in 1880, that even if that dam had been completed as it originally was, and remained unbroken, it would not have kept the water out of Buena Vista Lake?

"A. I do not know as to that; I could not say for certain. It might have run right over the dam. It would have been apt to run over it if there had been obstruction enough to run it that way.

"Q. Why wouldn't it all have gone down Buena Vista Slough?

"A. *For the reason that there is an obstruction north.*

"Q. Where?

"A. At the mouth of New River." (It is to be borne in mind that when Crocker speaks of the mouth of New River *he* means the mouth of the Middle Branch where it enters the slough in Section 30).

"Q. What made that obstruction?

"A. New River.

"Q. Do you mean by carrying sand down there?

"A. Yes, sir.

"Q. What kind of obstruction is that?

"A. It is sediment sand.

"Q. Has it been carried down by New River?

"A. Yes, sir; to the mouth of New River.

"Q. And it has so filled up the slough there as to force the water into the lake; is that it?

"A. That is the way I understand it, a portion of the water" (fols. 652 to 657).

On re-direct examination, Crocker is asked:

“Q. Would the construction of that levee” (*i. e.*, the levee at Cole’s) “in any manner interfere with the water running down Buena Vista Slough?”

“A. No, sir.

“Q. What effect would it have upon the waters running in Buena Vista Slough?”

“A. *It would make more water run in the slough. If the gate was closed, it would make the water run north, instead of letting it run south into the lake.*” (Fol. 702.)

SOUTHER (for defendant):

“There was a head-gate put in at Cole’s Bridge in 1877, and there was work done on Cole’s levee at that bridge. The old road levee was reconstructed and made higher and stronger. I think that was done in the latter part of 1877. There were two purposes in making that levee; one was for the county road, in order that the travel might pass over it easily, and the levee was thrown up to make a roadway. The next purpose was to hold the water coming down these branches that I formerly described” (the South Branch and the Middle Branch), “from going back into Buena Vista Lake, or to turn them in, as the case might require. This gate was put in that I speak of—a large head-gate—for that purpose; for the purpose of handling the water. That gate was put in for the purpose of letting the waters go into the lake, or of preventing them from going to the lake, or to let them out of the lake, just as the case might require. The water could not be let out of the lakes until it first got into the lake, of course. From my knowledge of New River, and my experience here in this country, New River—all these branches that I have described, and which we crossed there—came down and ran in right at that point above the bridge, or near the bridge, within a few feet of it, into Buena Vista Slough. It turns and runs back into the lake whenever the water is low enough in these lakes, of course, to allow the water to run. Usually there is a large

“ amount of evaporation over so much territory as these
 “ lakes cover. The evaporation is very great; hence
 “ they are always low in the fall of the year, and
 “ the water continues to flow into these lakes until
 “ they are filled to the water level before it turns to run
 “ back the other way.” (T. III, fols. 663 to 666.)

W. R. MACMURDO (for defendant), speaking of the dam and weir at Cole's Crossing, says:

“ I have had something to do with constructing weirs;
 “ I know how they are built generally. I could not say
 “ exactly how that one is built at the bridge—that is
 “ the part that is under the ground.

“ Q. What is the object of that weir, do you know?

“ A. I can only say what I suppose. The weir is
 “ constructed in such a way that I suppose it is to hold
 “ the water from going towards Buena Vista Lake; the
 “ rafters are inclined at an angle, and the slope is to-
 “ wards Buena Vista Lake, so that the pressure of the
 “ water on the side north of the levee would be the
 “ proper way; that would lead any one to suppose that
 “ that was the way the water was intended to be held
 “ against the weir; that the water would be coming
 “ from the north; would stand higher on the north side
 “ than on the south; the weir has upright sides to it,
 “ and the floor made of boards; the portion of the weir
 “ to regulate the water is composed of rafters inclined
 “ at an angle of forty-five degrees to the plane of the
 “ floor; the angle is towards the south; that is, the
 “ rafters are nailed to the floor at the north end, the top
 “ of them further south; so if you stand just north of the
 “ weir the bottom will be nearer to you than the top.
 “ That leads me to think it was put there for the pur-
 “ pose of stopping the water from running southward;
 “ for, if the water were to back up on the other side,
 “ next to Buena Vista Lake, it would raise the boards
 “ right up. If a weir were constructed for the purpose
 “ of preventing the water going into the lake or pre-
 “ venting it going out, you would have a very different
 “ construction from the present weir, I should think;

“in fact, I know it would. It would probably be constructed with upright posts and boards on either side, so that the water could be held up on either side.”
(T. IV, fols. 1188 to 1191.)

W. McFARLAND (for defendant):

“Q. Did you ever see any head-gate about that crossing?” (Cole’s Crossing.)

“A. Yes, sir; I saw it this year. I saw it in 1877, I think, the same head-gate.

“Q. Will you describe how that head-gate is constructed? Was it an upright head-gate?

“A. No, sir; it was put in, the top part of it leaning to the south, probably at an angle of 45 degrees.

“Q. Have you ever constructed any head-gates?

“A. Yes, sir; that is my business, to a considerable extent.

“Q. When a head-gate is constructed in that form, leaning at an angle of 45 degrees, and upward to the south, in what direction is it intended to control the flow of the water?

“A. It is to hold the pressure of the water from running against it. If the top is leaning to the south, the water is supposed to run to the south. The pressure of water would be from the north side; that would be the natural direction of the water when it leaned that way; it would be to hold the pressure from the north side.

“Q. Suppose the pressure of the water was coming from the south side; suppose, in this instance, that the water, instead of moving from the north towards Buena Vista Lake—suppose this head-gate had been put in there to prevent the water, or controlled the water from running from Buena Vista Lake northward, what utility would it have for that purpose?

“A. The rafters would have had to run the other way, or else be square—perpendicular, before it would be safe. It might have controlled it, but it would not have been safe. The pressure of the water would have lifted it up.

“Q. Would not the pressure of the water have washed the boards out?

“A. Yes, sir; lifted it right up, of course.

“Q. Have you ever known a head-gate constructed to control water running naturally from the south to the north, by having the top of the head-gate lean 45 degrees to the south?

“A. No, sir; any gate of that kind is usually put in straight?” (T. IV, fols. 1486 to 1490.)

SOL. JEWETT (for plaintiffs):

“I was down there in 1878” (*i. e.*, at Cole’s Crossing). “There was a drop in the bridge. The water was passing over the drop in the bridge. I mean by drop, there were boards under the bridge to keep the water from passing to the left. The water was to the right and the boards were to keep it back. That drop was put there to keep the waters from going into Buena Vista Lake.

“Q. Suppose that dam—that drop in the bridge had not been there, what would have become of the waters?

“A. They would have run into the lakes—Buena Vista Lake and Kern Lake, until they were full, and then run back again. If that drop had remained open, the waters of New River would have run into the lakes. (T. II, fols. 255 to 257.)

R. L. DIXON (for defendant):

“Q. Can you point out on the map, as near as you can remember, the portions that were overflowed in 1876?”

“A. I can point out some there where the water came, and to what extent; I don’t know that I can do it particularly. The water came up; I first observed it on Section 24; it came from the low slough there; then it came in on the southern part of Section 19; I mean that it backed up out of the slough on to Section 19. On Section 29 there was an overflow. Section 30 was nearly all under water; that is, on the north

“ side of the slough. I did not go across, and I do not
 “ know to what extent it was on the south side or the
 “ west side of the slough. On the ranch side pretty
 “ nearly all of Section 30 was under water, and a portion
 “ of 19 was under water. *Section 32 was bound to be*
 “ *under water ; Section 33 was bound to be under.* I think
 “ that overflow was in March—February or March, in
 “ 1876. It was previous to this overflow of 1876 that I
 “ saw the dam completely across Buena Vista Slough at
 “ Cole’s Bridge; I don’t know how long that remained
 “ there. *From my knowledge of the country I do not*
 “ *think it would have overflowed had the dam not been there.*”
 (T. III, fols. 517-18.)

This overflow in 1876 is the same as that mentioned by Miller.

Dixon then describes the overflow of 1878:

“ There was another overflow in 1878; that was in
 “ May.

“ Q. What was the extent of that overflow in 1878?

“ A. All of Section 24, to the levee, was under; that
 “ is, the levee on this Map H—the levee of the Kern
 “ Valley Water Company. The whole of that section
 “ (24) was under. The water also ran across 19. I can-
 “ not tell you how much of 19, but my judgment was
 “ there was more than half of 19 under.

“ Q. More than half of 19, according to the line
 “ you are pointing, going very nearly diagonally across?

“ A. Yes, sir; it also ran up in what you asked me
 “ to designate as Gage Slough, up past the centre of
 “ Section 20, on that slough, backed up there beyond
 “ the house, going eastward along what they call the
 “ Gage Slough. In checking my land I had put a check
 “ on the south line of Section 20. It lay against
 “ that and up to 29, and stopped at the salt grass
 “ ridge. All of Section 30, as far as I could see,
 “ was under water. I could not state about the
 “ west side. That portion of the Section 30 east of the
 “ slough was bound to be under. Section 29, all except

“the salt grass ridge, was under. The salt grass ridge
 “is on the northeast corner of the section. It was all
 “over Section 28, and all over 29, and all over 27. I
 “could not see 34, 33 or 32. That was down the slough.
 “*They were bound to be under when the water was over*
 “*the others; it was bound to be.* From my knowledge of
 “the country about Sections 32 and 33, and around
 “there, they were bound to be overflowed; they could
 “not help it.

“Q. Do you know whether there was any dam across
 “Cole’s bridge at that time?

“A. The levee was there up at the bridge. Whether
 “the levee was completed under the bridge, or at the
 “head-gate, or whatever was there, I don’t know; but
 “it was stopped. When I saw it, it was already
 “stopped up, so that the water flowing down Kern
 “River could not go south from that point.

“Q. Could not go into the lake. From your knowl-
 “edge of the country, from having seen that levee,
 “bridge, dam, etc., had there been no levee, no bridge
 “and no dam there, would there have been that same
 “overflow?

“A. I don’t think so, sir; I do not think it possible
 “it could be to that extent. From my knowledge of
 “the country—I have never run any levees—it would
 “go into the lake.

“Q. I am speaking of your general knowledge of
 “that country.

“A. *It would flow south into the lakes—Buena Vista*
 “*and Kern Lakes.* I make my answer on that from my
 “knowledge of how I see the water flowing.” (Fols.
 “519 to 524.)

Again: Dixon says:

“I had seen that levee at Cole’s this year, in April.
 “It is open at Cole’s bridge.

“Q. Have you seen generally the amount of water
 “that is coming down the river at this time, since that
 “during April and May?

“A. I saw it before, and I have seen it since; I have

“crossed the river several times before and several
 “times since I saw the break in the levee at Cole’s
 “bridge. I first saw it about the middle of April,
 “1881.

“Q. Then you know generally, I understand, the
 “quantity of water that has been flowing in the river
 “about these times, at present; were that bridge
 “closed, that levee at Cole’s bridge closed, from your
 “information of that country, your knowledge of the
 “condition of the water, etc.; could you say that any
 “portion of that land would now be overflowed?

“A. Yes, sir; it would overflow some of my land.
 “I think that opening in the levee is what prevents an
 “overflow there at present.” (Fols. 528-9.)

WALTER JAMES (for defendant):

“I was at Cole’s bridge in the latter part of April,
 “1878; the water was very high at the bridge in the
 “slough, north of the bridge; south of the bridge the
 “water was very low; lower than I had ever seen it.

“Q. Why was the water higher at the north than at
 “the south?

“A. The levee was constructed across the slough,
 “excluding the water from the lake; north of the levee
 “the water seemed to be spread out all over the country,
 “the levee held it up higher on the north than on the
 “south side; there was a dam across the slough; it pre-
 “vented the water from flowing down the slough; it
 “stopped the water entirely at that time from flowing
 “into the lake.” (T. III, fols. 164-5.)

Again:

James having described the course of the waters of
 New River as he found it in April, 1881, and having
 testified that all those waters discharge into Buena
 Vista Slough at a point near Cole’s Bridge (T. III, fols.
 171-2), is asked:

“Q. What becomes of that water, then, at the
 “slough?

“A. The greater portion of it flows into the Buena

“ Vista Lake; the other portion goes northward. The
 “ levee is still there, but a portion of it is carried away
 “ and a portion remains. (Fol. 173.)

“ Q. Have you examined the country around there?

“ A. Yes, sir; I have seen the levee and know the
 “ general condition of the country north and south of
 “ the levee; I have examined it; there is a difference in
 “ the elevation between the north and south side of
 “ the levee at Cole’s Bridge; *the cause of this difference*
 “ *is the filling up of the slough north of the bridge; this has*
 “ *been caused by the flow of water being stopped at that point;*
 “ *the deposit from these channels of the river has filled up*
 “ *the slough.* (Fols. 174-5.)

“ Q. Now, Mr. James, if the levee had never been
 “ placed there, this accumulation of sand, you say,
 “ formed there by the levee, what would have been the
 “ course of the water after reaching that point?

“ A. *It would have flowed into Buena Vista Lake.*

“ Q. At all times or conditions of the lake?

“ A. Until the lake would become filled up. After
 “ the lake was filled then it would flow the other way.
 “ I do not wish to state that any possible head of water
 “ that would come down the river would always neces-
 “ sarily flow that way. A large head of water would
 “ flow another direction.

“ Q. What do you mean by a large head of water?

“ A. Some water—

“ Q. [Interrupting.] I am speaking of the ordinary
 “ flow of the river.

“ A. The ordinary flow of the river, at ordinary
 “ stages of the water, it would flow towards Buena Vista
 “ Lake until the lake was full.” (Fols. 179 to 181.)

J. D. SCHUYLER, called as an expert by defend-
 ant, testified:

“ I am a civil engineer; I am the chief assistant of
 “ the State Engineer.

“ Q. As the chief assistant of the State Engineer
 “ what are your duties?

“ A. Thus far they have been to make a general

“study of the problems of irrigation throughout the
 “State; the different irrigation districts which have re-
 “quired work of various kinds and character.” (T.
 III., f. 1058.) “I have examined Kern River gener-
 “ally from where it emerges from the cañon to where
 “it enters Buena Vista Lake. Its general course is
 “southwest.

“Q. Where does the river empty?

“A. It is now emptying into Buena Vista Slough;
 “from there a portion of it runs into Buena Vista Lake,
 “and another portion of it goes northward.

“Q. Have you at any time been in the vicinity of
 “Buena Vista Slough—in the vicinity of where this
 “water empties?

“A. Yes, sir; I was there once or twice in 1879; I
 “have been there since; I was first there in February,
 “1879; I was then along the slough from Wible’s head-
 “quarters up to the lake, southward and along through
 “the lakes. The water was not then flowing; it was in
 “February. I have since been in the vicinity of the
 “point in the slough where the river emptied into the
 “slough. I have been to Cole’s bridge and seen the
 “water there; it was during the last month—April,
 “1881.

“Q. During the past month, which way was the
 “water flowing at the bridge?

“A. The water was flowing under the bridge, south-
 “ward.

“Q. Under the bridge, was the flow of the water
 “free?

“A. There was an over-fall at the bridge; there
 “was a great deal of fall. The water was not alto-
 “gether unobstructed. I saw a levee at that bridge.

“Q. From your general knowledge of the river,
 “and of the conditions there at that bridge and vicin-
 “ity, what, in your opinion, would be the course of the
 “river had that levee and bridge never been placed
 “there at Cole’s?

“A. From what point do you speak of?

“Q. Take the course of New River.

“ A. I should judge that the water would first seek
 “ Buena Vista Lake, and after filling the lake it would
 “ also fill up Kern Lake—back water. *The general*
 “ *preference of the water seems to be to go in that direction;*
 “ *that seems to be the line of the greatest declivity from the*
 “ *river.*

“ Q. Now, placing the obstructions there, placing
 “ the levee and bridge at that point, assuming that the
 “ water came down through those south channels
 “ shown on this Map I, what would be the result—
 “ what would be the result from the obstruction being
 “ placed there, in your opinion?

“ A. The first result would be to cause a deposit of
 “ whatever material the water was carrying, or a por-
 “ tion of it; and the water not being able to go south-
 “ ward, it would all be forced northward towards Tu-
 “ lare Lake. Kern River carries a very considerable
 “ amount of deposit, either in suspension or rolling
 “ along the bottom, and if the velocity were checked
 “ at the bridge by any obstruction in the channel, the
 “ tendency would be to deposit the material it was
 “ carrying, and it would have the effect of building
 “ the slough up at that point, by diverting the waters
 “ northward, they would naturally having freed them-
 “ selves from the materials they carried in suspension,
 “ they would have power to take up more material and
 “ scour out the bed further on its way north.

“ Q. Now, Mr. Schuyler, assuming that in its nat-
 “ ural condition, there was about the middle of Sec-
 “ tion 29, T. 30, S., R. 25 E., across Buena Vista
 “ Slough, a higher point, a higher elevation, than at
 “ any other point further south, in its natural condition,
 “ and you place an obstruction across the slough, south
 “ of where the waters empty into the slough from the
 “ river, a complete obstruction to the river, a levee,
 “ dam or whatever it might be, and cause the water to
 “ turn northward, you have stated that there would be
 “ a deposit formed, I understand you, in the neighbor-
 “ hood of that obstruction?

“ A. Necessarily.

“Q. What effect, if any, would it have upon this
 “higher point in the middle of the slough, this point
 “I designate as in Section 29, further north?”

“A. The obstruction would force the water to flow
 “northward over this high point that you suppose to
 “be in Section 29; the effect of the water flowing over
 “that point would rather be to cut it down to some
 “extent, depending altogether upon the fall below
 “there.

“Q. I understand you, then, to say that in that
 “condition of affairs, assuming that the waters came
 “down this south branch and found an obstruction
 “there which prevented them from running to the
 “lakes, checked them completely and forced them
 “northwards, and that there were a higher point in
 “this place, that I designated in the middle of Section
 “29 on the slough, than the original point where the
 “levee or obstruction was placed, the tendency would
 “be to raise the bed at the levee at the obstruction, and
 “to cut it out and deepen it at the other point?”

“A. Yes, sir; that would be the natural tendency.”
 (T. III, fols, 1064 to 1073.)

GEORGE H. MENDELL, also called as an expert
 for defendant, speaking of the dam at Cole's Bridge, is
 asked:

“Q. Is such a work calculated to obstruct the flow
 “of the water at all?”

“A. Yes, sir. It encroaches on the natural water-
 “way.

“Q. Suppose that there were a dam thrown across
 “the slough at this point that you speak of, Cole's
 “Bridge, and the channel completely obstructed there,
 “what, from your knowledge of the country, the forma-
 “tion of the country, etc., would be the result of such
 “a work?”

“A. Well, that water which now runs through that
 “channel of Buena Vista Slough, past Cole's Bridge
 “into Buena Vista Lake, being no longer able to go
 “there, would be obliged to take a northerly direction
 “towards Tulare Lake.

" Q. Would such an obstruction have any effect upon the channel itself?

" A. It would have an effect, yes, sir; *the tendency of an obstruction of that kind in forcing this water to go to the north would be for that water to make a channel for itself in going to the north, and to enlarge the existing channel. if that channel had not been accustomed to carry that quantity of water, now being called upon to carry it, the tendency would have been to enlarge this channel, that it would have followed towards the north.*

" Q. How about that to the south?

" A. Well, *that portion to the south, between that and the bridge or levee that you suppose to be there at the bridge, the tendency there would be the opposite, the converse; the tendency right at that place would be to cause a deposit in case the river is a sediment-bearing river—bearing down sand and other sedimentary matter. That would become in there a quiet place; the direction of the current being off in the other direction, this being a low place and there being no current in it, would naturally become a place of deposit for the sediment that was in the water; a quiet place. So the tendency there would be to fill that place between the bridge and the mouth of the river, and then changing the course of the stream as it flows to the north below there, the tendency would be to enlarge the channel.*

" Q. You say the tendency of a sediment-bearing stream; do you know whether this Kern River is such a stream as that?

" A. Yes, sir; it bears sand. The view I have given with regard to the formation of this delta indicates that; so I consider that it is a stream of that character.

" Q. So an obstruction placed across any part of the channel of the river, or of the slough, would have the tendency, you say, to build it up?

" A. Yes, sir; *and to cause an enlargement of the channel in the other directions.*" (T. III, fols. 985 to 990.)

Col. Mendell and Mr. Schuyler both testified that the natural result of the obstructions placed at Cole's Crossing, would be, first, to turn the waters northward; second, to cause a deposit in, and filling of the channel at that point, and at the same time deepen and enlarge the channel further north; and Walter James testified that the channel has actually been filled up just north of Cole's Bridge.

Now, let us see how much filling has been done at the one place, and how much cutting away at the other.

R. L. DIXON (for defendant), in October, 1875, crossed Buena Vista Slough at what he terms his Hog Camp Crossing, which was about 50 yards north of the mouth of what he calls the North Branch of New River (designated by other witnesses as the Middle Branch). He says:

"At that time the slough was something like 30 or 40 feet wide; the bottom of the slough at that time was not more than one or two feet below the surrounding country. I don't think it exceeded two feet. I think if you put two feet of water in there it would overflow its banks."

(T. III, 495-6.) *"I have seen this point on the slough, which I call my Hog Camp Crossing, of late date; I have seen it frequently of late; I last saw it during the month of April, 1881. The channel is now much deeper there, and I think it is wider; I think it is nearly one-third wider than it was when I saw it in October, 1875; I think it is all of four feet deep now, may be deeper; I think now it will carry four feet of water without overflowing its bank."* (Fols. 497-8.)

MACMURDO (for defendant) ran a line of levels along the slough from the head-gate of the Kern Valley Water Company's Canal. Says he:

"I assumed the elevation of the floor of the head-gate at the Kern Valley Water Company's canal to be 100 feet, as marked on map H, at the extreme northwest corner of Section 15; that was the floor of the head-gate below the general bottom of the canal on

“the upper side of the gate; the general bottom of the
 “canal was a little over three feet higher; three feet
 “and a fraction; the elevation at the point where the
 “canal leaves the slough on Section 14, was about 104;
 “I don’t remember exactly what was the elevation at
 “the mouth of Gage Slough; it was 108 and a fraction;
 “less than 109 and more than 108.

“Q. Do you remember what the elevation was at
 “the mouth of the middle branch in the slough?

“A. It was 109.8.

“Q. Do you remember the elevation in the mouth
 “of the middle channel of Kern River?

“A. No, sir; I don’t remember it; it was 113 and a
 “fraction in the mouth; it was higher than the bed of
 “the slough. *Just north of Cole’s Bridge the elevation is*
“111 and a fraction; 111.3 I think; just south of Cole’s
“Bridge it is between 103 and 104; I don’t remember the
“fraction exactly.” (T. IV, 1192-3.)

Why is it that the slough just north of Cole’s Bridge is now 111.3, while just south of the bridge it is 103 and a fraction—a difference of more than seven feet—unless from the sands and sediments deposited there by the water being turned north? There is no other possible way to account for the difference. We then have it that from the bridge to the mouth of the Middle Branch there is now a decline *northward* of a foot and a half, whilst prior to the construction of the dam at Cole’s the decline must have been at least nine feet *southward* from the mouth of the Middle Branch to the bridge.

But notwithstanding these obstructions at Cole’s Crossing, notwithstanding even the fact that the grade of the slough has been so changed as to now decline northward where in former years its decline was to the south, it seems that the waters of New River are still striving to reach the lakes; that year after year, since the dam and the levee were placed at Cole’s, the waters of the river have broken through these obstructions, and, until again obstructed, resumed their flow to the south. As late

even as April, 1881, the greater portions of the waters which reached the bridge—the dam being broken—were passing to the lakes.

GEORGE DAVIDSON (for plaintiffs) made certain measurements of the flow of the water in the vicinity of Cole's. He says:

"I found there was a little more than 400 cubic feet passing per second towards Buena Vista Lake, and there were a little over 300 going northward." (T. II, f. 1480.) "These measurements were made yesterday" (f. 1505); that is, April 21st, 1881.

GEORGE H. MENDELL (for defendant) also measured the flow of the water at Cole's upon two different occasions—the first on April 17th, 1881, and the second on April 30th, 1881. (T. III, f. 1015.)

"Q. When you first made those measurements, what amount of water did you find running south to the lake at this point you mentioned?

"A. I found about 370 cubic feet per second.

"Q. And what amount did you find at the ford to the north?

"A. Just about half that, almost exactly half of it; that would be 185 cubic feet per second. That was on the first occasion." (Fol. 993)

The measurements on the 30th of April were made at the same points as those made on the 17th.

"On the 30th of April," says he, "there were 438 cubic feet per second going to the north and 567 feet going to the south." (Fol. 1018.)

Now, a word from the experts as to the natural drainage of the waters of Kern River.

GEORGE DAVIDSON (for defendant), on his direct-examination, says:

"Kern River is at the head of what we call, in the U. S. Commissioner's Report, a delta, which is formed by the debris brought down by the Kern River. It

" has spread out, fan like, from a direction east of south
 " to a west southwest direction, and terminating on the
 " borders of the lakes Kern and Buena Vista." (T.
 II, f. 1473.)

On cross-examination:

" Q. What I want to get at is whether or not you
 " can tell—I do not know whether it is possible for any-
 " body to tell—whether there has been a time when
 " none of the waters of Kern River ever ran into Buena
 " Vista Lake at all?

" A. I think not, because the grade of the country
 " would be against it.

" Q. Do you think it impossible that there ever was
 " such a time?

" A. I think not.

" Q. Do you pronounce it a physical impossibility?

" A. I should think it was almost physically impos-
 " sible from my examination of the country and my
 " knowledge of the country.

" Q. That there ever could have been a time when
 " none of the water of Kern River ran into Buena Vista
 " Lake?

" A. No, I have not said that. I said that in my
 " opinion I cannot see how it is possible that there was
 " a time when they would not.

" Q. You say that it is a physical impossibility that
 " there ever could have been a time when none of the
 " waters of Kern River would have gone into Buena
 " Vista Slough? [(?) Lake.]

" A. We misunderstand each other. *I think it has*
 " *always been the line of drainage down into Kern Lake*
 " *and Buena Vista Lake.* What I am trying to say is
 " *this: that they must always have gone into Kern and*
 " *Buena Vista Lakes except there was some exceptional phys-*
 " *ical reason why they were diverted temporarily further to*
 " *the west.*

" Q. Artificially?

" A. It might be artificially or naturally. Under-
 " stand me, I am not catching at any words.

"Q. Nor am I; I do not want to do it.

"The Witness. I mean this as an engineer. *I might block up the channel of the river and throw its waters in another direction.*" (Fols. 1495 to 1498.)

COL. MENDELL, (for defendant,) having described the general features of the "Kern River Delta," lines of declivity, etc., is asked:

"Q. Then I understand you to mean that the natural line of this water is towards the Lakes?

"A. Yes, sir; the slope of the ground, the slope of the country determines that. I consider that the natural drainage." (T. III, f. 982.)

J. D. SCHUYLER (for defendant):

"Q. From your general knowledge of the river and of the conditions there at the bridge and vicinity, what, in your opinion, would be the course of the river had that levee and bridge never been placed there at Cole's?

"A. From what point do you speak of?

"Q. Take the course of New River.

"A. I should judge that *the water would first seek Buena Vista Lake, and after filling the lake, it would also fill up Kern Lake—back water. The general preference of the water seems to be to go in that direction; that seems to be the line of the greatest declivity from the river.*" (T. III, f. 1067.)

We have now shown:

1st. By the testimony of Fried, Jewett, Rosemeyer, Stine and Canfield, that in the winter 1861-2 the old South Fork was closed at its head, and thenceforth, until the winter of 1867-8, the natural flow of the waters of Kern River was down to and through Old River—as set forth in Finding 8.

2d. By the testimony of Jewett, Cross, Hoke, Watson, Niedaraur, James and Anderson, that from and after the flood of 1867-8 fully one-half of the waters of Kern River continued to flow down Old River until the

Fall of 1877, when the Stine Canal Company, building a head-gate across the head of Old River, turned the greater portion of the waters which had previously flowed therein, down the channel of New River—as set forth in Findings 9 and 10.

3d. By the testimony of Macmurdo (what seems, however, to be an admitted fact), that the waters of New River continue in one channel until they reach a point in Section 23, T. 30 S., R. 25 E., where the South and the Middle branches fork.

4th. By the testimony of Walter James, James Dixon, R. L. Dixon and L. L. Dixon, that the so-called North Branch or Gage Slough is not a branch of New River, and does not constitute a water-course.

5th. By the testimony of Wible, Davidson, James Dixon, R. L. Dixon, Souther, Conner, L. L. Dixon, Jackson and McLean, that the greater, more usual and accustomed flow of the waters of New River is and ever has been into and through the South Branch in preference to the Middle Branch.

6th. By the testimony of Macmurdo, James, Wible, Davidson, Jewett, Souther, Conner and L. L. Dixon, that those waters of New River which enter the Middle Branch at its head again unite, in their ordinary, usual and accustomed flow, with the waters of the South Branch at or near Cole's Crossing; and that it is only in times of very high water that any water, even from the Middle Branch, flows into or continues through the shallow channel shown in yellow on map H, or to or into Buena Vista Slough at a point in Section 30, T. 30 S., R. 24 E., (as claimed by plaintiff's), or at any point other than that known as Cole's Crossing—as set forth in Findings 5 and 11.

7th. By the testimony of James Dixon, R. L. Dixon, Souther, Noble, Jackson, Dumble, McFarland, McLean, Barnes, Pensinger, Ober, Wilkinson, Miller, Sol. Jewett, Crocker, Wible, Macmurdo and James, that the waters discharged into the slough near Cole's Bridge, in their natural flow, flow southward to and into Buena Vista Lake.

8th. By the testimony of James Dixon, R. L. Dixon, Souther, Jackson, Dumble, McLean, Barnes, Pensinger, Miller, Crocker and Jewett, that all the waters of New River, whether flowing through the South Branch to Cole's Bridge, or through the Middle Branch to Section 30 (as claimed by plaintiffs), after reaching Buena Vista Slough, at whichever point, flow, in their natural flow, southward to and into Buena Vista Lake.

9th. By the testimony of James Dixon, R. L. Dixon, Dumble, McLean, Souther, Ober, Wilkinson, McFarland, Miller, Wible, Crocker, Macmurdo, Jewett, James, Schuyler and Mendell, that the purpose and effect of the obstructions at Cole's Crossing was, and is, to turn the waters of New River northward and away from the lakes.

10th. By the testimony of James, Macmurdo and R. L. Dixon, that the placing of these obstructions at Cole's Crossing has, by filling up the channel at that point, and deepening it and enlarging it at a point north of the mouth of the Middle Branch, changed the downward grade of Buena Vista Slough and caused it to now bear northward from Cole's Bridge, instead of southward from a point north of the mouth of the Middle Branch, as it did prior to such obstructions.

11th. By the testimony of Prof. Davidson, Col. Mendell and Mr. Schuyler, as experts, and of all the above-named witnesses as to facts, that the natural drainage of Kern River is to and into Buena Vista and Kern Lakes.

It therefore results that, so far as pertains to the natural drainage of Kern River and the flow of its waters to Buena Vista and Kern Lakes, Findings 4, 5, 8, 9, 16, 50, 71 and 78, are amply supported by the evidence.

These lakes then being the place of discharge of and for the waters of Kern River, its continuity as a water-course ceases there; and it necessarily follows:

1st. Should the lakes become so full as to, at times,

overflow their banks, the waters, which from such overflow find their way northward to the swamp, do not so flow as to constitute a part or continuation of Kern River.

2d. The waters which so reach the swamp do not themselves constitute a water-course or regular flowing stream; their flow, being dependent upon the contingency of the lakes overflowing, is deprived of that degree of certainty which is essential to a water-course.

3d. Even could they be deemed a water-course, the source of such water-course would be the lakes themselves and not the river.

At most, however, these overflows from the lakes are but rare in occurrence and generally small in amount, as we shall hereafter show under the heading "Buena Vista Slough."

Buena Vista Slough.

To constitute a water-course, under the universally accepted definitions, there must be a defined channel and a regular flow of water—there must be bed, banks and flowing water. The water need not flow continuously, but it must flow with certainty, and its flow must be usual and accustomed; though, at times, it may spread beyond the banks, yet, in its usual flow, it must be confined within the banks, and the direction of its current must correspond with that of the bed and banks. The bed and banks must have a well defined and substantial existence; they should be visible and ascertainable, and such as to confine the water in its usual flow.

Flowing water does not constitute a water-course. There must be bed and banks to guide the flow.

Bed and banks do not constitute a water-course. There must be water flowing within, and usually confined to such bed and banks.

We contend that within Buena Vista Swamp the essential attributes of a water-course—bed and banks and usual flow of water—are wholly wanting.

Finding 71. *“From the point where New River enters Buena Vista Slough * * * to and into Buena Vista Swamp, as far north as Sec. 24, T. 29 S., R. 23 E., there is a traceable, but, in places, detached channel * * * of varying width and depth. From the River northerly to said Swamp said channel is well defined, but after reaching said swamp, to its northern extremity in said Sec. 24, said channel is not well defined, nor continuous, and is not a defined natural channel with bed and banks, but consists more of a series of holes than a regular water-way. Said channel terminates in and is not traceable beyond said Sec. 24. Whatever waters have gotten down into said swamp without the aid of the artificial obstructions in these findings mentioned, before reaching any of said lands of plaintiffs, have not been confined to said channel, but have spread generally and indefinitely over said swamp; and said waters do not constitute a regular flowing stream or water-course, but consist, in addition to the seepage and percolation in these findings mentioned, of occasional bursts of water which, in times of freshets or melting snow, overflow the banks of the river above, or flow out of Buena and Kern Lakes, after having been stationary therein, and inundate the whole of said swamp as far northward as the water reaches. Said swamp, though sloping slightly towards the north, is generally flat and level; and though interspersed throughout the same, there are channels, hollows and depressions, either natural or made in part by the action of the floods and waters, such channels, hollows and depressions have no continuity or connection one with another, and are found running in all directions and generally throughout said swamp. Whatever flow or movement said waters have or ever had, is not and never was usual or accustomed, but is and was only occasional and sluggish, and in no manner confined to said channels, hollows or depressions.”*

CROCKER (plaintiff), on his direct examination, swears in substance that Buena Vista Slough is a continuous stream or water-course, from Buena Vista Lake through the swamp to Tulare Lake, flowing in places in

one channel, in others in two, and in others again in three. But Crocker is a ready swearer. He swears either or both ways as circumstances dictate or his interests prompt. He swears that there was a continuous flow of water through the swamp during the whole of the year 1871 (T. II, fols. 490 and 549-50); then he swears there wasn't (fol. 569); and then again he swears there was (fols. 611 to 614.) He swears that the first time he ever saw the slough without any water running in it was in 1876 (fols. 490-1 and 507); and yet he swears it was dry in 1871 (fol. 569.) He swears the first year he ever pumped was in 1876 (fol. 510), and then he swears he pumped in 1871 (fol. 714). He swears that the waters of the middle branch of New River run south (fol. 525), and then he swears they run north (fol. 526). And so with Buena Vista Slough. Your Honors will see from an examination of his testimony that, though he first swears that there is a continuous channel throughout the swamp, he still, with his usual versatility, swears that there is not.

On his direct examination, having stated that he has been "on every acre in that swamp, from one end of "it to the other, at different stages of water" (T. II, fol. 494), that he has crossed it "at all points most that "there are on the map" (fol. 495), he is asked:

"Q. Have you been on that slough when there was "only a moderate height of water flowing down it?

"A. I have.

"Q. When that was so, how would the water run "through Buena Vista Slough?

"A. It would be more confined to its banks. Where "there was *prominent* banks the water would be confined to those banks. Then, where the banks were "not so prominent, the water would spread out more.

"Q. When a moderate head of water is running "there, it will be confined to the banks where you speak "of—those well defined banks? How much territory "would be spread over where the banks were not so "well defined?

"A. It varies considerably. In some places it

“would spread over from one-fourth to one-half a mile,
 “and in other places it would spread over very little, if
 “any. It would leave the tule lands on both sides out
 “of water in many places. *In many places it would flow*
 “*back.*” (T. II, fols. 505-6.)

Your Honors will note that he is describing its flow
 when there is only a *moderate head* of water.

Again:

“Q. This is the slough that runs by the Tule House,
 “from the Tule House into Tulare Lake?

“A. A well defined slough,

“Q. It is the easterly slough. Is it deep?

“A. It is *when it is full of water.*

“Q. Are the banks well defined?

“A. In some places. *In some places, in portions of*
 “*the slough, the water will extend out over the banks.*” (T.
 II, fols. 521-2.)

On cross-examination, Crocker is asked:

“Q. Well, was there no water in the slough at all
 “in 1871?

“A. There was. * * * It began along in the
 “winter or spring, I think probably in March. / * * *
 “I know it ran down the swamp, as near as I can rec-
 “collect fifteen miles, and that stopped running. I think
 “it ran a couple of months.” (T. II, fols. 568-9.) What
 better refutation of plaintiffs claim to a continuous chan-
 nel through Buena Vista Swamp, can there be than this
 statement of Crocker's, that for *two months* the water con-
 tinued to flow into the swamp, and yet reached no further
 than fifteen miles down; and how absurd does their
 claim appear, when in connection with this statement
 of Crocker's, we consider the testimony of Walter
 James, that in May, 1871, the swamp at its southern
 end was all covered with water, and yet when crossing
 the body of swamp land in the vicinity of Goose Lake,
 he found it absolutely dry, not a vestige of water any-
 where. (*Vide*, T. III, fols. 124 to 128, and fols. 136
 to 138.)

Again :

Crocker is asked :

“ Q. Is that a continuous slough or channel, from Wible’s Camp down to Weed Island?

“ A. No, sir, not quite to Weed Island?

“ Q. How far from Wible’s Camp does a continuous and well defined slough extend north?

“ A. I think 3 or 4 miles—3 miles. (T. II, fols. 575-6.)

“ Q. For that distance of 3 miles, where you say it is well defined, what is the shallowest bank in the whole slough in that three miles?

“ A. I should think it was 30 or 40 feet.

“ Q. I speak of the heights of the banks, not the width.

“ A. I think it runs out as you go towards it; the nearer you get to Weed Island the shallower the banks get.

“ Q. You told me there was a well defined channel there, from Wible’s for 3 miles?

“ A. Yes, sir; and the banks in the deepest are 15 or 20 feet deep.

“ Q. At the shallowest, how deep is the channel?

“ A. I should judge probably 8 or 10 feet, and prominent for that distance; then probably as you go north, it runs out.

“ Q. To nothing?

“ A. No, sir; not entirely to nothing.

“ Q. What is the depth of it at the end of that 3 miles—the depth in the channel?

“ A. It is more of a depression than of a channel where I spoke of yesterday of the drift-wood blocking it up. There is no drift-wood there now.

“ Q. There is no channel to the end of that 3 miles, going north?

“ A. Yes, there is a channel; there is a channel that is cut out on both sides of the slough.

“ Q. Cut out; has it any banks?

“ A. Yes, sir.

“ Q. How wide apart?

"A. I could not tell how wide they are.

"Q. How far apart are the two banks of that channel, if it has any banks?

"A. It is cut out in places.

"Q. I am speaking of the bottom of that 3 miles in the Old Slough that runs down you say 3 miles, and is a well defined slough with high banks. At the end of that, where it ceases to be well defined, how wide is the distance between the banks, if it has banks, below that?

"A. I should suppose it to be—the slough is wider after you get right to this low place where the water breaks out; the slough is wider than it is this way.

"Q. How wide is it after you get 3 miles down and leave the well defined banks?

"A. That is the place I am speaking about.

"Q. How wide does it get at the widest?

"A. It branches into three sloughs; one runs on each side.

"Q. Are there three well defined sloughs there?

"A. *In portions of the way there are; in some portions.*

"Q. Immediately after you leave the point where the well defined slough ceases, do you come to the three sloughs that are stated on this map No. 2? Show me where it ceases to be a well defined slough on there.

"A. I should think it would be somewhere here (pointing on map). It would be somewhere on Sec. 32, I think. Let me see, I said about three miles from the canal camp. It would be somewhat about here (pointing).

"Q. Wherever it is, *it goes down until it ceases to have well-defined banks to it?*

"A. Yes, sir." (Fols. 582 to 587.)

Your Honors will notice that, though persistently urged to give the width of the slough at or below the point where it "breaks out," Crocker, wholly unable to ascribe any width to it, systematically evades the question.

" Q. Now, at that point just below that point, how wide is it between the two banks, if there are any banks?

" A. There it is more of a depression on both sides where the water has cut it.

" Q. It is more of a depression in the ground than a channel cut through the ground? Is that so?

" A. Yes, sir.

" Q. Well, it has no banks to it, then?

" A. In places it has.

" Q. In places it has not?

" A. In places it has sloping banks.

" Q. It has no banks; just a depression in the ground?

" A. No perpendicular banks.

" Q. No banks of any kind, has it?

" A. It has in places.

" Q. THERE ARE PLACES WHERE THERE IS NO BANK AT ALL?

" A. YES, SIR.

" Q. There are places where there is a sloping bank on each side, and places where there is a very well defined bank cut right down by the action of the water?

" A. Yes, sir.

" Q. 10 or 20 feet high?

" A. Yes, Sir.

" Q. Then there are other places where there is no bank?

" A. No perpendicular banks.

" Q. No bank of any kind?

" A. Yes, Sir." (Fols. 588 to 590.)

Again:

Crocker says: "In going from Wible's down to Weed Island, when the water is taken off there, and the country is perfectly dry, I only found one channel from Wible's down to Weed Island. That is, to where it widens out. That, I guess, is about three miles. (T. II, fols. 600.)

" Q. From that point down to Weed Island, how many channels are there?

"A. From this point where it breaks out?

"Q. Yes.

"A. There are three.

"Q. Where are they on the map?

"A. I cannot tell where they are on the map—on this or any other. I only know from knowing the country." (Fols. 600-1.)

"Q. From that point, which is just three miles below Wible's, down to Weed Island, you find three channels in the swamp land?

"A. Yes, sir.

"Q. Wherein do they differ from each other, if at all? Mark you, I am speaking of when they are dry.

"A. I don't know that they differ materially—the three. Two of them do. The centre channel has got more prominent banks than those on the two sides.

"Q. The centre one has not any banks at all, has it?

"A. Yes, sir.

"Q. How wide are those banks apart, again?

"A. *That is the bank below this break?*

"Q. Yes, sir; *I am talking about after you got below the break; it has no banks?*

"A. Yes, sir; it has banks *in places*, and deep.

"Q. How wide are these banks? How wide apart?

"A. I presume they are very nearly as wide as the slough. They are not half a mile apart, nor a quarter.

"Q. Wherein does that channel below the point where it is well defined, as you say, differ from this western channel?

"A. It differs because *in portions of the way* this has cut through and formed a regular bank. I speak of the western one.

"Q. Then the western channel is well defined, and looks more like a water-course than the middle channel?

"A. No, sir. It carries more water than the middle one, because the middle one was shut up with the driftwood, which turned the water out of it at one

“time. I think *the water will run into this western channel before it will run into the middle one.*

“Q. Don’t you know about that?

“A. I think I have seen water running there; I would not be positive. I am pretty sure I have seen water running in this channel before it got into that, but I would not be positive as to that.” (Fols. 603 to 606.)

Now, plaintiffs have adopted an ingenious theory for overcoming the disappearance of the channel at the point described by Crocker as “three miles below Wible’s.” They ascribed this ceasing of the channel at that point to the lodging there of driftwood brought down by the flood of 1867–8. Many of plaintiffs’ witnesses say that the lodging of this driftwood at the head of Weed Island filled up the main channel (which they designate as the centre channel—the one running through Weed Island), and caused the water to cut two new channels at that point—one to the east and one to the west. But unfortunately for them the plausibility of this theory is destroyed by the testimony of Crocker himself, who says that he saw water running in that west channel as early as 1854 (T. II, fol. 606), and of Briggs, one of plaintiffs’ witnesses, who, speaking of the channel about Weed Island, says that from the time he first knew it (i. e., from 1864, *vide* fol. 1090) up to 1880, when he last saw it, the channel has remained the same in all respects (T. II, fols. 1116–17), and of F. A. Tracy, another of the plaintiffs’ witnesses, who, describing the channel through Weed Island as it existed prior to the flood of 1867–8, says:

“From 1863 up to 1867 and ’68, there was an open channel of water running down there.

“Q. How far from the lake was that an open channel from 1863 to 1867 and 1868?

“A. It was an open channel down to the centre of Weed Island, and through Weed Island was an open channel.

“Mr. Garber.—Q. An open channel down through the centre of Weed Island?

"A. Down to Weed Island; through it there was a channel, but it was not well open through it.

"Q. What is that?

"A. It was not very well opened. There were some obstructions in there of flags that had grown up in the channel at the head of it. I mean at the head of Weed Island." (T. II, fol. 954-5.)

It has been a favorite way with plaintiffs' witnesses to describe a channel as being ascertainable or traceable by the absence of tules. They say that where the channel is, tules do not grow. On this subject Crocker is asked:

"Q. How is it in the channel that you speak of, in the water—any tules in it?

"A. There are in places.

"Q. Right in the channel which is marked down there as the main slough?

"A. Yes, sir; I presume there is. When I saw it there was, when I was there last.

"Q. Any difference between that you call the bed of the channel and the balance of the swamp, as to growth of tules in it?

"A. Yes, sir; there was a difference.

"Q. What is the difference?

"A. The tules where there is a current of water running down do not grow so thick as where there is no current. Where the current is running tules do not grow until the water comes on.

"Q. Is there any part of the swamp now where the tules do not grow, which you call channel?

"A. I think there is.

"Q. Is it a well defined place, running down north?

"A. Yes, sir; in places.

"Q. And in places there is no such absence of tules?

"A. Yes, Sir; There are many places in the channel that no tules grow, and many places where they do grow.

"Q. Take it over where Kern River comes into the slough, from there down to this canal is there any growth of tules right in the slough?

"A. No, sir; I don't know of any; no growth of tules in there at all. There are tules along outside of the slough, in places; in some places, I presume, a quarter of a mile wide. There is no growth of tules in the channel there.

"Q. From Wible's down to the head of this Weed Island, is there any growth of tules in what is marked as the channel on the map.

"A. No, sir; none at all.

"Q. In the swamp land that is marked as swamp land on the map, outside of the channel, is it all covered with tules?

"A. In places where the water channel is; in places there are tules, and other places not. By the channel I mean where the main current of water goes.

"Q. I am speaking of the slough, from Wible's down to the head of Weed Island?

"A. In the main slough, in the centre of the slough.

"Q. In the center of the slough you told me there was no growth of tules?

"A. Not in the centre.

"Q. Is there any in this slough to the west?

"A. There is none until you get to where this timber was lodged. *From there down there is tules growing in that place, right in the channel of the slough.*" (T. II, fols. 641 to 645.)

"Q. How far is it from where the timber lodged down to this Weed Island? What portion of that distance do the tules grow in the channel—on a straight line, without following the bends on the slough?

"A. I should judge you would find tules in different places; not all of the way, but in different places, *for a distance, perhaps, of three miles.* I would not be positive. Where the tules grow, in most places there is a deep quagmire; you cannot get across it. A horse would bog right in, all through.

"Q. Are the tules growing in this western channel, say, from the head of Weed Island down? Do you find tules growing in that channel?

"A. You do in some places." (Fols. 648-9.)

Again:

"Q. The entire portion of the cha^wnel which extends
"from Buena Vista Lake clear into Tulare Lake, how
"high are the banks at their lowest?

"A. At the lowest, in some places there would be
"no banks at all, but this depression.

"Q. Where there are banks?

"A. There are *in many places* high banks.

"Q. At the lowest, how deep would they be?

"A. I suppose some of these banks along there
"would be a foot deep; I think *they could not be much*
"lower." (T. II, fols. 681-2.)

Again:

"Q. For how long a period have you ever known
"the water to stand above the banks of the channel,
"continuously?

"A. I could not tell you. On portions of it I have
"known it to stand. *I suppose it stood on the greater*
"*portion of it for a considerable length of time; probably*
"*a year or two.* It might have been longer, or it
"might not have been so long." (Fols. 695-6.)

We submit that this testimony of Crocker, as to sloughs through the swamp, conclusively establishes the fact that there is no continuous channel or water-course, with defined bed and banks, further north than "three miles below Wible's." We will hereafter show, by his own testimony, that there is none even that far.

Another of plaintiff's witnesses whose testimony is very much akin to that of Crocker, is F. P. McCray, civil engineer and surveyor. Like Crocker, he states that there is a continuous channel through the swamp, but, also like Crocker, he contradicts himself by showing that there is not.

F. P. McCRAY (for plaintiffs), on his direct examination, states that he made plaintiffs' Maps 2 and 3:

"Q. The channels of Buena Vista Slough, as de-

"lineated on Maps 2 and 3, are correctly expressed as they now exist on the ground?"

"A. I *think* so; yes, sir." (T. II, fol. 382.)

These maps 2 and 3, are much relied upon by plaintiffs. Plaintiffs' ideal sloughs are pictured upon them. Their witnesses swear by them. So important a part have they played in plaintiffs' case that, unless the sloughs and channels within the swamp be just such as are represented upon them, plaintiffs' whole theory of a water-course fails.

Now, let us see how maps 2 and 3 were made and how correct they are. To properly appreciate them, however, it is necessary to first know something about Maps "B" and "D."

In December, 1877 (T. II, fol. 387), and January, February and March, 1878 (fol. 395), McCray made certain surveys within the swamp, sectionizing the southern portion thereof to as far north as the northern limits of Sections 27, 28 and 29, T. 27 S., R. 22 E. (T. II, fol. 1600), and meandering the slough from the mouth of the Middle Branch of New River to Section 24, T. 29 S., R. 23 E. At the time of these surveys and meanderings, and from his notes thereof, McCray made Maps "B" and "D."

Map B was made from actual survey. "That," says he, "is the only complete map I have made of those 'surveys.'" (T. II, fols. 871 to 873.) One has but to look at it to see how complete it is in every detail, and to appreciate the great care and labor devoted to its preparation.

As to Map D: It was with the utmost difficulty and only after much prevarication and equivocation on the part of both McCray and Wible, that we were able to procure Map D from plaintiffs. We place much reliance upon this Map D, and therefore specially call your Honors' attention to the great reluctance evinced by, or on behalf of plaintiffs in producing it. (*Vide* Trans. II, pages 103 to 105, 117, 118, 214, 217 to 227, 397.) When, however, it is produced, McCray is asked:

"Q. Do you know for what purpose this Map D was made?

"A. I cannot tell you that I know altogether for what purpose it was made.

"Q. You say that in part this was made from your field-notes?

"A. In part, sir.

"Q. I ask you how far the slough that is delineated on this map was made from your field-notes? How far down?

"A. The slough that is continuous there was made from my notes, from the meanderings down into Section 24, or down on the Bonestell place. The balance was made by sketching in *from my knowledge of the country*; my remembrance of it, and not from any actual survey, as I had not finished the entire township when called away from it. It is a finished map, so far as showing *the condition of things at that time* is concerned." (T. II, fols. 1587 to 1589.) "It was made embracing that country, which embraces the slough up to Section 24. It shows more than that. I had surveyed up that far. I had actually meandered to that point, and I made outline maps of it.

"Q. This map is correct up to that point, and beyond that you don't know of its correctness. Is that the case?

"A. *The map was made to show the country.* It was an outline map.

"Q. *I ask you if it is correct, this map, up to that point, Section 24?*

"A. *Of what it shows; yes, sir.*

"Q. *It was intended to show the slough as you meandered it, up to Section 24?*

"A. *Intended to show the slough as I meandered. I made the meandering of that slough, and platted it down, and traced it on the map.*

"Q. It is correct that far?

"A. Yes, sir; I platted it down and made surveys.

"Mr. McAllister: Q. I want to fix this Section 24.
 "In what township and range?
 "A. That is in Township 29 South, Range 23 East."
 (Fol. 1606-7.)

It seems that the system adopted by McCray in sectionizing the swamp and meandering the sloughs was to commence at the southern extremity of the swamp, sectionize all the swamp land in one township, and then—having thus familiarized himself with the sloughs within that township, and made notes and taken measurements thereof at every point where his section lines crossed a slough (fols. 1655 and 1659-60)—go back over the township again and meander the sloughs therein; and so on with the next township, and the next, etc. (Fol. 389).

Now, in 1877 McCray sectionized all that portion of the swamp lying south of the north line of Sections 24, 23, 22, 21 and 20 T. 29 S., R. 23 E., (T. II, pages 400-1,) and meandered the slough down to Section 24, T. 29 S., R. 23 E. (fol 1652.) Having done all this, and having made even further surveys within the swamp during the months of January and February, 1878 (fol. 395), he then, about the 1st of March, 1878 (fol. 1584), whilst the face of the country, the sloughs and channels are yet fresh in his mind, with his field-notes still before him, makes Map D; makes it *from his knowledge of the country and from actual survey*; makes it *to show the country as it then existed*.

Now, maps D and B were made at a time when the witness had no motive to color or misrepresent the facts in this case. They were made from actual surveys, "to show the country as it existed in 1877 and 1878."

But maps 2 and 3 were not made until April, 1881, (fols. 395, 410, 842); they were made "*for another purpose*" (fol. 416); were made, on the very eve of the trial of this case, "*to show the water-courses*" (fol. 414). They were not made from actual survey, for, says McCray, "I never made any surveys around Buena Vista Slough

“except those made in 1877 and '78” (fol. 411). “Map B embraces all the surveys made by me in 1877 and ‘1878” (fol. 1600). Nor were they made from the field-notes taken at the time of these surveys, for McCray says: “Those field-notes were turned over to the Kern Valley Water Co. in 1878. I don’t know where they are now. The last time I saw them was when I turned them over in 1878. I have not seen them since” (fol. 421). He did not even have copies of them. (Fol. 1608.)

McCray is asked:

“Q. Does this map number 2 represent exactly the map you made in 1878?

“A. No, sir.

“Q. In what respect does it differ?

“A. The map that I made for the company” (Map B) “does not show the slough so much as this does; and it shows the section lines just as they are, and the levees and the weirs, and matters of that kind” (fol. 412.) *

* * * *This was made to show the water-courses through there, and the other was not.*

“Q. This one was number 2?

“A. Yes, sir.

“Q. But the other was made by you from your actual survey?

“A. Yes, sir.

“Q. That didn’t indicate the lines of the slough, as this map number 2 does?

“A. No, sir.

“Q. You didn’t make this map from actual survey, but as a copy from your other map?

“A. I took such portions of the other map as I needed, and from examination upon the field I put it all together.

“Q. But this map number 2 is not an exact copy of the other?

“A. Not an exact copy. This is made for one purpose and that for another (fols. 414 to 416). * * *

“On the map which I made for the Kern Valley Water

“Company” (Map B), “there only appeared the survey of this stream down to a point where I stopped meandering, and below that point there was nothing in the plat to show the meanderings of that slough or the crossings of that slough. The balance of the work done by me in the field to enable me to plat this slough from the point where it was dropped in 1877 and 1878, has been done within the last three weeks. A portion of it was done by actual work in the field. That portion I had subdivided was done by going into the field with the outline in my hand and finding the corners, some of them, and from that filling in with such as I had. The plats or maps show the crossings of the sloughs below Section 14, at the very point where I located it in 1877 and 1878, and the filling in has been done by examination between those points (fols. 423-4).

But McCray is mistaken about “the filling in being done by examination between those points,” for (fol. 810), he says that there were places in the channels and depressions *so filled up with tules that he could not, did not get through*, and (fol. 804), he says that he only went over “such portions as he was not familiar with or needed.”

“Mr. Flourney—I wish to see every paper—every memorandum or data upon which you made either of these maps, or both of them.

“A. I can show you the sketches that I took in the field at the time. Made them as I went along. I have the sketches with me. * * *

“Q. These were the sketches made by you at the time of the original survey?

“A. Yes, sir.

“Q. These are the sole data upon which you made the Map No. 2, except your observations in the field at the time, of which you have no memoranda?

“A. I had this, and I went upon the field, These were made upon the field, as I have stated to you, in

"1877 and '78. Then I took the map and went upon the field; took Map 'B' and Map No 2. I told you I took it from this Map 'B' also.

"Mr. Flourney—I will have this marked.

"[The papers are marked by the Reporter 'E' and 'F,' for identification.]" (Fol. 1610-12.)

"Q. Was this the only original data of field-work that you made in the field?

"A. I had other maps—I had that Map 'D.'

"Q. That is not field-work?

"A. A portion of it came from that map." (Fol. 1614.)

So it seems that Map 2 was made by taking it "upon the field," and there selecting from Maps B and D, and the sketches E and F. "such portions" as McCray wanted, and then filling up the balance, in some indefinite way, "for the purpose of showing a water-course."

Your Honors will remember the great difficulty we had in getting Map D, and how McCray so long and so persistently pretended not to remember anything about the map although we showed him two substantial copies of it (Maps A and C). It now appears that during that very month (April 1881) he was using the identical Map D in his manufacturing of Maps 2 and 3. (T. II, fol. 1614).

It is somewhat significant that in April 1881, McCray pictures, on Map 2, sloughs and channels which did not exist in 1877 and 1878. In 1877 he received instructions *to meander the streams*.

"Q. What was the object of meandering those streams at that time in 1877 and 1878?

"A. I received instructions to do so.

"Q. In 1877?

"A. Yes, sir.

"Q. You received instructions to meander the stream?

"A. Yes, sir

“Q. With what view?

“A. Just instructions to do so. These things are
“not always explained to the surveyor. *I took notes of*
“*the meander of the* WHOLE STREAM.

“Q. In making your map and marking the slough,
“was there any reason why the whole course of that
“meandering was not put upon it?

“A. Well, *my meanderings that I meandered at that*
“*time were put upon it*—those that I ran along the
“bank.

“Q. *Then the map was a correct map*” [Map B], “*so*
“*far as you meandered it, as to the slough?*

“A. Yes, sir. (T. II, fols. 805-6.)

We ask your Honors to compare these Maps B and D, made in 1878, with the Maps 2 and 3 made April 1881. The conclusion is inevitable that Maps 2 and 3 are false.

Let us now see how McCray *describes* the channels through the swamp, which he has pretended to represent on maps 2 and 3:

“Q. What does that line represent that is marked
“along there, all along here in Township 29 South,
“Range 23 East?” (Map 2.)

“A. That line represents the channel. * * * I
“mean that is the line of the slough, such as is repre-
“sented there.

“Q. Does that line represent THE *continuous chan-*
“*nel?*

“A. It represents A *continuous channel*; that is,
“*substantially* so; that is, varying in width, and
“changes some from what it is in the upper portion.

“Q. Does it represent a channel with defined
“banks?

“A. Well, as a general rule—as a rule it does.

“Q. Is there any point where it don't, as indicated
“by this map? Does the map indicate any point that
“it don't?

“A. I don't know that it does—the map itself.

“ Q. Then this is not exactly accurate in its representation as to that? These two maps that I am speaking of, from 14 to Tulare Lake?

“ A. It is this way about it: *you can't always represent the truth upon a map; some things have to be explained.*

“ Q. That is what I am getting at, the explanation, for fear that we might be misled by these marks. I was satisfied they were the ordinary ways of making marks by surveyors, and frequently they understood it better than others looking at them. Then there was a continuous channel the whole route?

“ A. There was a traceable channel there. By traceable channel, I mean the water at low stage would pursue a certain course, such as represented there.

“ Q. At low stages?

“ A. At low stages; that is to say, it will not spread beyond the limits that are shown there.” (T. II, fols. 390 to 393.)

But McCray is mistaken in this. The flow of the water in 1881 as described by Crusoe, Fillebrown and Macmurdo, as well as the general testimony of many other witnesses shows conclusively, as we shall hereafter see, that the water spreads from side to side over the whole swamp before it will go through or follow the lines traced by McCray on Map 2. Even the testimony of McCray, himself, shows that the water spreads before going through. He says that he has never seen water running to Tulare Lake—not from Wible's to Tulare Lake—but that in 1878 he saw it running *all over the swamp*—that portion that is represented by Map 2, and the southern portion of the land represented on Map 3 (fols. 820-1 and 824). He is asked:

“ Q. Was that water running beyond the head of the canal—past it?

“ A. Yes, sir.

“ Q. Into the slough?

“ A. *Into the swamp.*

“ Q. Into the swamp?

"A. Into the slough, too" (fols. 822-3). There was "also water in the canal" (fol. 824), and there was a "break in the canal at that time (fol. 822).

Now, we know that in 1878, whilst McCray found water *running into and all over the southern portion of the swamp* (he then knew nothing about the northern portion—that shown on Map 3: *vide* fol. 842), the water did not go through to Tulare Lake; nor could it at that time have gone very far northward in the swamp, for, during the whole time that McCray was there in 1878 (January, February and the early part of March), Crocker was pumping water for his cattle. "*We pumped,*" says Crocker, "*until along in March*" (fol. 511), *because there was no water* (fol. 514). Norton, too, was pumping and pulling cattle out of mud-holes: "Pumped," says Norton, "from June, 1877, to March, 1878" (fol. 1671). Crocker also says: "In 1878 there was a time—in a portion of 1878—I saw the slough when there was no water in it. I think it was from January to—but I could not tell you exactly. It was probably a month or two.

"Q. Do you mean to say that for a month or two at that time, in 1878, there was no water running in any part of that slough?

"A. *It was then running IN THE UPPER PART.*" (Fol. 594.)

Crocker also states that "*In 1878 the water was not running clear through.*" (Fol. 593.)

Again:

On re-direct examination, McCray is asked:

"Q. Now, Mr. McCray, what is the condition—we will take the slough in sections—what is the condition of the slough, starting where you left off your meanderings in 1877 and 1878 down to the point where you had represented the two channels as meeting at the north end of what we have marked as Weed Island. What is the condition of that slough on the east side of Weed Island?

"A. As it now is, the channel is of different widths and also of different depths. In some points it is quite prominent, and at others it spreads out over several hundred feet perhaps, and it is so through a good portion of it. It alternates from one to the other.

"Q. Is there a well defined channel between the point where you left off meandering in 1877 and 1878 in Section 14" (he means Section 24, *vide* fol. 1646), down to the point where the two channels come together at the north end of Weed Island?

"A. There is a well defined line showing where the water runs; but at some places it is quite deep, and has steep banks; at other places is spread over the ground at different widths of several hundred feet, and the lowest place is in the middle of it, *a sloping bank from there to the levee.*

"Q. How far is it from the point where you left off meandering in 1877 and 1878 down to the north end of Weed Island?

"A. *Weed Island is a point I have not definitely established.* According to that map" (his own map), "it is about two miles from the north end of Weed Island, and of that two miles *probably* one-half of the channel would be with banks and a deep channel." (T. II, fols. 425 to 427.)

It is very remarkable that, though McCray made surveys and meanderings through the swamp, traced out channel after channel, slough after slough, made maps upon which he pictured the island, maps showing the country "as it actually existed," and maps showing the water-courses as he imagined them for the purpose of this suit, yet when asked about Weed Island says: "*Weed Island is a point I have not definitely established.*"

On re-direct examination:

"Q. In describing the character of the channel, on yesterday, where there ceased to be perpendicular banks, what is the appearance of the country, from what you saw, to indicate that that was a place where a current ran?

"A. By being lower than at other points, and although it may have been wider at the extreme, it rose more suddenly from the bottom. It would rise to a level, but there would be a depression shown there very plainly to be seen. I went entirely across the swamp along there, and through it lengthwise.

"Q. Clear across the swamp?

"A. Yes, sir.

"Q. Did you find but one line of depression?

"A. No, sir.

"Q. You found but one line of depression?

"A. I found more than one line of depression different places in the swamp.

"Q. Did you find numerous lines of depression?

"A. In some places I would.

"Q. Numerous lines of depression, such as you speak of?

"A. Yes, sir.

"Q. Now, what appearance did the ground present? You say there was no water in this place. What appearance did the ground present aside from the mere fact of the depression; was it bare?

"A. In the depression? Not at all times; no, sir.

"Q. How did it look; grown up with tules?

"A. It looked like it had tules in it. *Places you could not get through. It had tules in it.*

"Q. *You did go through it?*

"A. *Some places I did not get through.*

"Q. All over it?

"A. Sometimes in some places there was not.

"Q. How was it generally?

"A. *Generally in these depressions there was tules, but not always, though.*

"Q. *Generally there were tules extending clear across?*

"A. *Extending across the channels or depressions.*

"Q. And the tules were outside of the channels, were they not?

"A. Outside of the channels in places—out in the swamp.

"Q. And that same appearance of tule growth was

"in those numerous lines of depression that you speak
 "of out in the swamp as well as in where you supposed
 "the channel to be?

"A. Well, *there were many depressions there that had
 "tules within the depression; many that were detached like.
 "They had no visible source or no direct outlet. The be-
 "ginning and terminus would perhaps be over level ground
 "but depressed somewhat, and covered with tules. Then
 "there were channels again that might be traced for a
 "long distance.*

"Q. They were frequent, too, weren't they?

"A. I don't know that they were. There were a
 "number of channels there that could be traced, but
 "there are a good many places over the swamp—

"Q. (Interrupting). You mean a number of places
 "that show that water would naturally flow through in
 "case there was water? Lower than other points?

"A. Lower than other points.

"Q. Then what you mean by there being defined
 "channels at all places except where there were per-
 "pendicular banks, is where there were depressions and
 "sloping banks, and, perhaps, wide channels, but in-
 "dicating that it was a place where the water would
 "naturally go, being lower than other points?

"A. No, sir; that is not exactly what I mean by a
 "continuous channel.

"Q. What do you mean, precisely?

"A. What is a continuous channel?

"Q. Yes.

"A. I say there were many depressions you would
 "come across in going through the swamp—depres-
 "sions that bore the appearance of having been a por-
 "tion of the slough at one time; *sometimes they would
 "spread out over level ground, so as not to be perceptible to
 "the eye, but to trace them from above or below a con-
 "tinuous channel would run along, perhaps a very
 "narrow place, but it has different depths where it
 "could not be crossed. At others, again, it would
 "run over ground of different widths, where there was
 "no danger in crossing, and it might be at some points*

“a depression such as would rise from a center to a level. That is a continuous channel.” (T. II, fols. 807 to 814.)

Again:

“Q. As you come down from the Tule House, did I understand you to say that you found a continuous defined channel or the bed of the stream the entire route?

“A. Over a great portion of it it was so.

“Q. Well, is there any of it that is not so?

“A. There was a part of it that the channel was not so well defined as it was in the others. It was merely a water way.

“Q. The question I asked you was, is there a defined channel continuous there that entire route?

“A. There is a channel running through the entire route, where the water at low stages will run only along that particular line.

“Q. Well, is there a defined channel, where water customarily or usually runs along the entire route, and a continuous channel?

“A. There is, as I say, where water will run along that particular line.

“Q. I understand water will run all along there when there is any to run, and when it is high enough. I mean there are some places where there is a defined channel, and some where there is not?

“A. Yes, sir.

“Q. I want to know if there was when this survey was made, in this month you speak of, a defined channel or bed of a stream continuously along that route, from the tule shanty down to this point of connection here?

“A. The way that the slough is—

“Q. Just please answer me.

“A. Well, I can answer you by explaining it.

“Q. I want it answered in my way, and then you can explain it afterwards. I ask you this question: Was there from the tule shanty down to this point of

"connection where you run down going back southward, a continuous defined channel or bed of a stream with defined sides and banks?

"A. Not with well defined banks there; no, sir.

"Q. There wasn't?

"A. No, sir; not with well defined banks.

"Q. It presents the appearance that water had passed over it, at different places?

"A. It is what would be termed a water channel I presume.

"Q. But it did not have defined channels and banks. Was it defined at all, the sides and banks? You know what the bank of a stream is?

"A. It was this way. There was a depression there of perhaps a hundred or two or three hundred feet in width, may be. The water would go into that and it would be several feet in depth, but the banks from the bottom would be uniform. They were started at the lowest part and sloped gradually, so *that the eye could not detect where they rose to the level.*

"Q. Suppose there was no water at all there. How would you know where the water stood or ran at that time? Did it leave its mark where it usually coursed? That is what I mean by the bank, where the water leaves its mark as a margin.

"A. I think there would be no trouble at all in finding it. At the time when I was there water had been there, and stands along there in places.

"Q. I understand that—that always happens. But I want to get at this point, whether there was anything that shows that it is customary for water to course—to pass along the particular place. You can tell that. When Kern River was dry you could tell where the water went—when there was water there. *I want to know if these margins or banks and bed of this stream are so plain that you could tell from here to there at every point, not where you could imagine the water could go, but where the water had left its own impression by leaving banks and sides?*

"A. No, sir." (Fols. 400 to 406.)

Again: On re-direct examination:

Relative to the channel to the west of Weed Island (into which, Crocker says, water will flow before it will into the middle one), McCray is asked:

"Q. Are the two channels where this division takes place, of Buena Vista Slough, correctly delineated—that one on the west side of this map?

"A. It is delineated by going over the ground.

"Q. Is it correctly delineated?

"A. It is generally correct; it crosses the section in the manner that is shown there.

"Q. It crosses the section at the correct points?

"A. *I think so.*

"Q. Doesn't this on the west side of Weed Island cross the section there by actual survey?

"A. That does right there. The channel running on the west side of Weed Island is of different widths. *I hardly know the width; it is quite varying in width, may be 150 feet, may be wider than that; may be not so much; there is not a great deal of the west channel that has perpendicular banks. I should think there would be fully one-half of it that ran in a divided channel, but not so prominent as the slough which I meandered. The balance of it runs over or runs through land that is lower. I don't know hardly how to describe it, but it is so low as to confine it and keep it from spreading out. It runs over the ground that is low.* (T. II, fols. 430-1-2).

Your Honors will already have noticed that McCray possesses a fertile imagination. Now, had there been the slightest semblance of a channel in this "Western Channel" he would unhesitatingly have magnified it into a "depression" or a "water-way." But there being none he can only classify it as "low ground."

"Q. If you should turn into Buena Vista Slough, a regulated and moderate head of water, enough to go through from one end of the slough to the other, is there a channel that that water would run through before it would spread out and cover the body of swamp and overflowed lands?

"A. I think not. That is it would spread over a portion, not all of it." (Fol. 453.)

THOS. L. BRIGGS (for plaintiffs), was through the swamp more or less from 1864 to the present time. On his direct examination he states that there was a well defined channel between Buena Vista and Tulare Lakes from four to twenty feet deep, and from twenty to one hundred yards wide in places.

But on cross-examination Briggs weakens:

"Q. What do you mean by a well defined channel from Buena Vista Lake to Tulare Lake?

"A. I mean at very low places.

"Q. You mean simply low places?

"A. Yes, sir; *where there is not much tule in it.*

"Q. Not much tules in places, and other places tules grow over it, just like the balance, isn't it?

"A. No, sir; not in those places. That is the same as to both of these channels. I never traced down the channel from Buena Vista Lake to Tulare Lake.

"Q. Did you ever follow directly on the line of the main channel from Buena Vista Lake to Tulare Lake?

"A. I have for some distance, but not the whole distance. I call the main channel the one on the east side. It is a well defined channel. *It runs on the east side of Weed Island;* what I call the main channel. I have not been to Weed Island very lately. I was there last in 1880. The channel was there, and the same as before.

"Q. Have you noticed, in your experience in the slough, any change of the channel at any time?

"A. No, sir; the channel in 1880 was the same as when I first became acquainted with it.

"Q. In all respects?

"A. To the best of my knowledge.

"Q. Suppose you cross the swamp, which you did do frequently, as you say, directly across from the east to the west, crossed Weed Island and struck directly across the whole swamp land district, how many channels would you strike?

"A. At one point?

"Q. At what point, crossing the middle of Weed Island, right across from east to west, about how many channels would you strike?

"A. There is two. One is on the east side of Weed Island. That is the main channel; and the other is on the west side, right at Weed Island. These two channels form Weed Island. *There is no other channel than those two. Those channels around Weed Island have not well defined banks in all places. The banks are sloping.*

"Q. How many places are there that are not well defined by well defined banks?

"A. I don't know. There is quite a lot of places.

"Q. Can you always find the banks, and know exactly and precisely where the banks are?

"A. Yes, sir.

"Q. How do you know that? Did you try that?

"A. I have been all over the country there, and when I see the banks I can tell them.

"Q. Well, in all places that you saw the slough, you saw well defined banks?

"A. No, sir; I did not say that.

"Q. If there were not well defined banks, how do you know then; how could you be certain?

"A. *Whenever there is banks, I ought to know when I see a bank.*

"Q. Of course where there is a bank, you can tell that. I mean where there are no banks?

"A. I did not say that.

"Q. If it had no banks you could not see it?

"A. No, sir.

"Q. *There are a great many places where it has none?*

"A. Yes, sir. (T. II, Fols. 1115 to 1120.)

C. W. CLARKE (for plaintiffs):

"In May or June, 1865, came to the slough near Tulare Lake, and worked all over the slough clear up to Tracy's Crossing.

"Q. What was the condition of the water in the slough at that time?

"A. Perfectly dry.

"Q. You crossed the slough at that place while you were there, did you?"

"A. I have crossed it. Well, *I came right up the swag*, following it right up there.

"Q. What do you mean by the swag?"

"A. Well, where the channel comes down here—a "water-course." (T. II, fols. 1147-8.)

But on cross-examination:

"Q. You mentioned that at some time you followed "what is termed Buena Vista Slough from the vicinity "of the Tule House out southward to about the Tracy "Crossing? * * *

"A. Yes, sir; * * * that was in 1865.

"Q. Did you find that channel *all of the way*, or did "you go out?"

"A. I struck straight across, and *whenever the "channel missed we would cross right along.*" (Fols. 1198-9.)

JESSE DOVER (for plaintiffs):

"Q. When water is turned in and allowed to run "down Buena Vista Slough, will it course along that "channel that you have spoken of before it will over- "flow the main body of land?"

"A. Not altogether; *there is places that it will over- "flow the banks before it will go through.* There is low "banks, a wide slough, that there ain't any perpen- "dicular banks and *it will back out*, but no great dis- "tance.

"Q. What width will it be before it would go "through in that channel?"

"A. Well, *there are places where it might back around "300 yards before it would go through.*

"Q. Then if you turn water into that channel, so "as to make it a continuous stream down it, how wide "would it be at the widest point to have the water con- "tinue running through.

"A. *I could not tell you how that would be.*" (T. II, fols. 1265-6-7.)

A. GODEY (for plaintiffs):

"Buena Vista Slough remained the same from 1858 to 1866" (T. II, fol. 128); and from his early knowledge of it, Godey thinks it must still remain the same as it was then. Says he:

"There is nothing that I can see to change it. If you would turn as much water in there now as there was at that time it would run just the same as it did at that time." (Fol. 128.)

But what is his description of the slough as he found it "*at that time*"? He was coming from San Francisco. "When about half way between Tulare and Buena Vista Lakes," says he, "it was my camping time, and I thought I would water easily by turning towards the slough, and I went into the tule, damp and dry, until I got to the slough. *When I got to the slough I got between two long holes of water, probably a quarter of a mile long, and a little water running between the two.* There I camped. I went through the tule there, probably about two miles from dry land, from the main road." (Fol. 126.)

Such was the condition of Buena Vista Slough as Godey found it in September, 1866, and such, according to this witness, remained its condition from 1858 to 1866, and on up to the present day; for, "*there could not be any change; there was nothing to change it.*"

This water that Godey found running between two holes was nothing but seepage-water, as we shall hereafter show. (*Vide*, post pp. 232 to 234.)

W. W. HUDSON, (for plaintiffs):

This witness was driving stock along Buena Vista Slough between 1859 and 1872 or 1873. (T. II, p. 47.) Says he:

"We followed the slough, in order to get water and camp."

"Q. Was there any change in that slough between the time you first went there in 1859 and the time you were last there in 1872 or 1873?"

"A. No material change.

"Q. The channel is the same now as it was then?"

"A. Yes, sir." (Fol. 185). "I last saw Buena Vista Slough between Buena Vista Lake and Tulare Lake in 1873, I think.

"Q. When you saw it last, was the general course of that slough, the water running through the same channel as it was when you first saw it?"

"A. Yes, sir.

"Q. There was no change?"

"A. No, sir. No material change."

(T. II, fols. 189, 190.)

Plaintiffs' Map, No. 1, is then shown to Hudson, and he is asked:

"Q. *Is the position of the slough from Buena Vista to Tulare Lake correctly delineated there, and the swamp lands?*

"A. Yes, sir, *I think it is.*" (fol. 191.)

We ask your Honors to look at the picture of Buena Vista Slough on plaintiffs' Map 1, which Hudson says correctly represents the channel as he found it from 1859 to 1873, and then compare it with that shown upon Maps 2 and 3, made and sworn to by McCray.

JOHN BARKER (for plaintiffs):

"Q. I understand that you are familiar with Buena Vista Slough, continuously, from 1854 up to and including 1859?"

"A. Yes, sir; I saw it all of those years." (T. II, fol. 334.) "I visited the Buena Vista Slough again in 1879, two years ago. I went down as far as Epperly's Hog Camp" (fol. 330)—that is, down to about Section 12, T. 26 S., R. 21 E., for at that time, from the Fall of 1878 up to the last of April 1880, Epperly's Camp was on the west side of the swamp eight miles north-west from the Adobe Holes. (T. II, p. 546.)

"Q. Was the main slough, as regards position, in the same place as when you saw it, from 1853?"

"A. No, it was not in the same condition. I could

"not recognize the country. It did not look anything like the same country at all" (fol. 331). "The tules were being burned off, and there had been stock traveling in there and broken trails through, and tramped what was formerly a large expanse of tules. The brush and weeds are all burnt out there, clear out, and it is changed considerably." (Fols. 357-8.)

"Q. How about the change in the position of the slough; did it run through the same country?"

"A. The slough seemed to be somewhere near the place it was at that time." (T. II, fol. 331.)

On cross-examination:

"Q. What was the condition of the water?" (When he went back, in 1879.)

"A. Well, there was a channel of water there.

"Q. The same way?"

"A. Well, about the same way; in a very similar way, as near as I can tell; *no material change that I could discover.*

"Q. No material change from the time you first saw it to the last?"

"A. It might have been more or might have been a little less.

"Q. Of course, very similar. You cannot be accurate about those things. You found the same general appearance?"

"A. Yes, sir." (Fols. 358-9.)

F. A. TRACY (for plaintiffs), after having described the slough or sloughs in the swamp as they existed from 1863 to 1868, was asked:

"Q. Has there been any change or material change in the sloughs since that time?"

"A. I think not; none that I remember of." (T. II, fol. 974.)

J. C. CROCKER (plaintiff), having been more or less along the slough and through the swamp from 1854 to the present time, is asked to describe the slough

by sections. Says he:

"Buena Vista Slough, from where it leaves Buena Vista Lake north, to within half a mile of where New River runs into Buena Vista Slough, or where it did when I was last there, is a very deep slough, the same as it was when I first saw it; a very deep slough, but not so much water in it. When you get within about half a mile of the mouth of New River, where it enters the slough, it is different there for a distance of two or three miles from what it was when I first knew it. It is filled up with sediment and sand; grown up with willows. When we first saw it there was no timber on it. *When you get still north of that point, the slough becomes more as it was in former years, wide and deep.*" (T. II, 515-16.)

THOMAS L. BRIGGS (for plaintiffs), who has been familiar with the swamp from 1864 to the present time, crossing it back and forth at all times and at all points, is asked:

"Q. Have you noticed, in your experience in the slough, any change of the channel at any time?

"A. No, sir; the channel in 1880 was the same as when I first became acquainted with it.

"Q. In all respects?

"A. To the best of my knowledge." (T. II, fol. 1117.)

F. M. EPPERLY (for plaintiffs):

"Q. Has there been any change in that channel since you first knew it in 1873 to the present time?

"A. Not that I can see, any more than the drift pile.

"Q. What change has taken place at the drift pile?

"A. The wood that has drifted there has been burned out and hauled out there and left the channel more bare than it was when I went there. *It has a better channel to pass through than it did when I first went there.*" (T. II, fol. 2193.)

We see from the testimony of these witnesses—Godey, Hudson, Barker, Tracy, Crocker, Briggs and Epperly—that from 1854 to the present day there has been no material change in Buena Vista Slough or the channels within the swamp. It follows, then, whatever be the condition of the sloughs or channels within the swamp at the present time, such must have ever been their condition as far back as 1854, and howsoever water may now flow within the swamp, so must it have flowed, whenever it flowed at all, during all those years.

Your Honors will have noticed, in reading the testimony of many of plaintiffs' witnesses, that it is a favorite trick of theirs to tersely describe a slough or channel at this or at that point as "*swimming*." That your Honors may not be misled by such testimony, we desire to call attention to the fact that *swimming* was not a matter of necessity with these witnesses, but rather one of choice.

CLARKE (for plaintiffs), speaking of the spring of 1867, is asked:

"Q. How did you make those crossings around there?"

"A. Well, in some places we would work around and get around, the horses would swim a little, perhaps. The men understanding the channels, at some places would ride in and swim straight across. The weather was warm. *It was just as the boys would take a notion, according to how they went.*" (T. II, fols. 1152-3.)

TRACY (for plaintiffs), was crossing to and fro in 1867 and 1868 (T. II, fol. 930.) Your Honors will remember that 1867-8 were the years of the flood, of the high water. Now, during those years Tracy says that he crossed below Weed Island. "When we crossed through there," says he, "we went on horseback.

"Q. How would you find the water at that point?"

"A. We would go across there without swimming, below Weed Island, by hunting for the shallow places and going around the deep places" (fol. 932.)

ROGERS (for plaintiffs):

"In November, 1858, the slough was deep and had plenty of water in it; water running at that time. I probably crossed the slough three or four different times; I crossed on horseback; *we did not swim; we picked out places in the slough as shallow as we could find,* and we crossed without swimming" (T. II, fol. 1287-8.)

Again:

"Crossed Buena Vista Slough in 1865, both in the spring and the fall. Crossed it at various times and at various places. There was some places we had to swim it, and *some places we crossed without swimming.*" (fol. 1292-3.)

MILLER (for defendant):

"Q. Do you know anything about the Swamp Land District north of what is now known as Wible's Headquarters?"

"A. Yes, sir; I have been there. *I have crossed it in high water, when it was flooded, when the water was all over it. I crossed it on horseback, and didn't have to swim my horse. I avoided swimming it by picking my way around in going through and passing around the deep places.*

"Q. How could you tell the deep from the shallow places?"

"A. I would generally keep among the tules, and out of water which looked like it was very deep. *The water was all over the swamp, without swimming.* I had no one to guide me in crossing.

"Q. Did Mr. Wible ever tell you how to cross so that you would not strike any deep channel?"

"A. No, sir; I judged by keeping in the tules and out of the clear water. I was in there hunting, and I would keep out of places that I thought was deep; would keep among the tules generally. That was in the winter and spring of 1876. I was in there in January, February and March, 1876, more than once.

"Q. You did this more than once then?"

"A. Yes, sir; I don't recollect exactly how many times I went entirely over the high ground from one side to the other. I have been through there hunting a good deal. I can recollect twice that I have crossed from the high ground on one side to the high ground on the other." (T. III, fols. 797 to 799.)

E. D. CROSS (for defendant), crossed the swamp to the north of Epperly's Hog Camp in March or April, 1876, *during the spring freshet*; the water was spread out over the swamp land district.

"Q. Did you find any swimming water in crossing?

"A. I did not cross it in any place where it was swimming; no, sir.

"Q. Did you strike any channel in crossing?

"A. No, sir; We didn't strike any channel in crossing; we went around to avoid the deep places. (T. II, fols. 471-2).

RACINE, even, whom we may regard as plaintiffs' champion swimmer, says that in April, 1863, "the banks, in places, might be swimming deep, but we found places that we could cross without swimming, and did not try it." (T. II, fol. 1236.)

And in 1881, Taylor, Thornton, Reading, McLean and others of defendants' witnesses, crossed the swamp when the water was from one side of it to the other, not only without swimming, but, really, without finding water more than two feet deep.

We do not propose to further follow plaintiffs' witnesses in their many varied and contradictory descriptions of the sloughs and channels in the swamp. Most of these witnesses, as your Honors will see, were "hog-men" or cattle-herders, who, in looking after their animals, would go plunging through the swamp, indifferent as to whether they swam a water-hole or passed around it dry shod. We have, however, quoted somewhat at length from the testimony of both

Crocker and McCray, our reasons for selecting them being that, though by no means the most disingenuous, they are amongst the most intelligent of plaintiffs' witnesses, and from long residence or careful examination should have had peculiar means of information about the swamp.

Though we deem that the testimony above cited clearly establishes that there is no continuous channel within the swamp, still, to remove all possible doubt thereon, we will now refer to the testimony of several of defendants' witnesses.

A. GLENN (for defendant):

"Q. Have you any knowledge of the Swamp Land District, between Tulare and Buena Vista Lakes?

"A. Yes, sir; I have been there frequently, up and down. I was first in that section of the country in 1857; about that time; I was there until 1860.

"Q. Were you there after 1860?

"A. Frequently." (T. III. fol. 594). "In 1857 I was around the head of Tulare Lake, I think that was in the spring, sometime between May and June.

"Q. How far were you above the north end of the Lake?

"A. I suppose I was probably 12 or 15 miles, somewhere along there.

"Q. The south end, I mean?

"A. That is what I thought. That is what we call the head of the lake.

"Q. Did you ever cross that country there at the head of the lake?

"A. Yes, sir; I have been there. I have been through different places, I guess 4, 5 or 6 miles, maybe, above the head of the lake. I crossed at that time at the road. *The road ran from Visalia to San Luis Obispo.* As well as I recollect, I think it crossed 5 or 6 miles, somewhere along there, above the head of the lake, south of the head of the lake. *I crossed on the road in 1857. I also crossed it there in 1859.*

"That is, I was through the country there and in the
 "road; I traveled across that road—I went across.
 "That was the road from Visalia to San Luis Obispo
 "at that time.

"Q. Did you cross any water on that road?

"A. Well, none later than 1861 and '62.

"Q. Was there any dry channel or washout that
 "you saw?

"A. I don't think there was. Of course I didn't
 "pay much attention to it. I was just crossing on
 "horseback.

"Q. You were down there in the spring of '57, and
 "you were there in '58, and '59, and '60?

"A. Yes, sir; I was there every year when I lived
 "below Visalia. I was there in the fall and spring
 "generally.

"Q. Did you ever see any water or sheet or water,
 "connecting Buena Vista Lake with Tulare Lake?

"A. Yes, sir; the first time that I saw that was in
 "1862; it was either 1861 or '62—1862, I think—and
 "again in 1867 I saw it." (The two years of flood).

"Q. Did you ever see a connection of water be-
 "tween these two lakes at any other time?

"A. No, sir" (fols. 595 to 599); "I have frequently
 "been up in the swamp country south of the San Luis
 "Obispo road.

"Q. Did you ever cross the swamp above that?

"A. I have been out in it quite a ways; I never
 "went entirely across.

"Q. What is the character of the country in that
 "Swamp Land District?

"A. *It is a level country.*

"Q. How is the water in it at different seasons of
 "the year?

"A. I have been there when there was plenty of
 "water, and I have been there again when it just stood
 "in pools or ponds. When there was plenty of water
 "it would be spread out for a mile or two wide, I sup-
 "pose. We always called it a swamp, and that is what
 "it was always termed. I never lived there; I was

"there very frequently, when I would cross it and was
 "in it. I would most generally go below to where Mr.
 "Broder used to live, and he had some Spaniards
 "there who understood going through, and I frequently
 "followed them. When I first knew it, *in 1857, the*
 "*swamp did not extend down as far as the road that I have*
 "*spoken of and crossed from Visalia to San Luis Obispo.*
 "*There was not any swamp for some distance, I don't*
 "*recollect how far, but it was some distance before you*
 "*would see any tules.* I never have been in that coun-
 "try when the water would rise in the swamp above
 "when the water came down, nor when it came down.
 "*It was either spread over the country when I was there,*
 "*or else it was dried up and in holes.* (Fols. 599 to 602).

"Q. It was always called a swamp country?

"A. We called it that. I never heard it called a
 "water-course or a stream of water." (Fol. 603).

John Barker (for plaintiffs), evidently refers to
 the same road mentioned by Glenn. He says, that in
 1854 he crossed the swamp from one side to the other.
 "The trail went across there and they used to travel
 "from the San Miguel to San Luis Obispo." (T. II,
 fol. 306).

E. H. DUMBLE (for defendant):

"Q. Were you ever down upon the Swamp Land
 "District between Buena Vista and Tulare Lakes?

"A. Yes, sir; I was through there first about in
 "April, 1863. I cannot tell exactly where it was; be-
 "tween 8 and 12 miles south of Tulare Lake. I crossed
 "the Swamp Land District at that time. There was
 "considerable of it under water.

"Q. Running?

"A. No, sir; I don't recollect that it was running;
 "standing water.

"Q. How did you manage to cross there? Was
 "there a road through there?

"A. I had a guide to show me across. We crossed
 "on a cattle trail. We crossed water, a good deal of

"water, shallow water. We crossed over the swamp
land from the east to the west side.

"Q Did you cross any slough in crossing?

"A. No, sir; we crossed right through the water,
and there was considerable water; perhaps, altogether,
three-fourths of a mile of standing water.

"Q How deep was it?

"A. Deepest right in the trail; perhaps two feet
deep; it was deeper right on the trail than it was off
to either side. The trail was trampled down; it was
from 2 feet to nothing. We crossed over some high
places and salt grass.

"Q. Did you find any channel?

"A. No, sir; *there was no channel.*

"Q. Any signs of a channel?

"A. No signs of a channel. I crossed it twice in
1863, very near the same place. The other time I
crossed it in August. In August I crossed from the
east to the west, going the same route, very nearly; I
could not say it was on the same trail exactly. I found
water in one hole in crossing. We went around it,
to the north end of the water hole. We found no
channel in that crossing; nothing but that hole. We
went around it on level ground; that is, to all appear-
ance. As near as I could see, it was *perfectly level.*"
(T. IV, fols. 1034 to 1037).

Dumble also crossed the swamp twice in July 1864,
in the vicinity of Goose Lake; saw a couple of water-
holes but went around them; *crossed no channel.* He
also crossed the swamp in March or April, 1865 (for
date *vide* fol. 1054), a little nearer to Tulare Lake.

"Q. Did you cross any slough or channel in that
trip?

"A. No, sir; we went around water holes with stag-
nant water in them. We sunk down along side of
these holes to get drinking water.

"Q. Did you find any channel anywhere in crossing
at that time in 1865?

"A. No, sir; not that I could see." (T. IV, fols.
1038 to 1040).

From 1863 to 1865 Dumble was County Assessor of Tulare County. (Fols. 1049 to 1054).

J. P. MURRAY (for defendant), as we have seen above (*ante* pp. 37, 38), was all over and through the swamp from 1864 to 1877. He is asked:

“Q. How is it as to the existence of any continuous channel through that swamp, from Wible’s headquarters to Tulare lake?”

“A. Well, there is not much of a channel along there. There is some sloughs along there, but *after you get down to where Wible’s camp is now, this Buena Vista Slough that comes down about there; a little below, if I recollect well; it spreads out all over the country.*

“Q. How is it as to a continuous slough along there; is there, or is there not?”

“A. *I have never seen a continuous slough through that country.*” (T. IV, fol. 1511).

WALTER JAMES (for defendant).

About the first of May 1871, “I went to the margin of the swamp and overflowed land to a place about section 2, T. 30 S., R. 24 E.

“Q. What did you find there?”

“A. I came there to the Buena Vista Slough, and we found the water flowing there; I am speaking about Section 2, Township 30 south, Range 24 East.” (T. III, fols. 122-3).

[Your Honors will note that even the most visionary of plaintiffs’ witnesses do not claim (*vide* Map 2) that there is any slough or channel anywhere within half a mile of the point designated by James—the *margin of the swamp and overflowed lands in Sec. 2, T. 30 S., R. 24 E.* So the slough found there by Mr. James must have been one of those isolated, disconnected channels mentioned in Finding 71].

“Q. You say you went to Sec. 2, T. 30 S., R. 24 E.; what did you find there?”

“A. There was water there running in the slough.

“Q. What kind of a slough?”

“A. A narrow slough, and quite crooked; we undertook to follow the slough down, and found the water flowing out *all over the country*.

“Q. Which way did you follow the slough?

“A. We traveled, as near as I remember, northwesterly along the slough. I know where the body of swamp and overflowed land is which lies in District 121; the point that I speak of is a place in that body of land, on or about the section I have mentioned; where I first struck it, the portions of it where the water was not flowing were dry; the tules were mostly burned off; it was tule land.

“Q. Then you followed the slough northward, you say?

“A. Yes, sir.

“Q. How far?

“A. Perhaps half a mile; at the end of this half mile there was a change; we then came to the water that was *spread out over the tule land; I cannot say how wide; we could not see across it; it was spread out all over the tules*; from there we traveled around the margin of the water one or two miles.

“Q. Did you find it in the same condition?

“A. Yes, sir; the water was quite shallow, and in some places seemed to be running, and in other places seemed to be standing; I cannot tell you how wide it was spread out there at any particular place; we went from there over to a point of timbers on Goose Lake Slough; before going to the point of timbers we traveled along the margin of the water. In some places *the water came clear out to the very margin of the swamp and overflowed lands*. We were traveling along that body of swamp land. The point of timbers is on Section 14, Township 29 South, Range 24 East. We found no water at point of timbers; we traveled then down Goose Lake Slough to Goose Lake, which was dry; there was no water at all in it; from Goose Lake we traveled around its south margin—at the dry bed of Goose Lake—and crossed to the high land on the west side of the swamp and overflowed land.

“Q. In crossing over from Goose Lake to the high land on the west side of the swamp and overflowed land, did you find any channel?

“A. No, sir; we did not see any channel at all; the country there was very dry; tules had been burned off, and no tules had started yet; we found no water there at all; *we were looking for water, to find a place to camp in the swamp land; we passed clear across without seeing any indications of water or slough.*

“Q. You say you were looking there for water. Why?

“A. According to some map which we had, we expected to find sloughs passing between Goose Lake and the dry land on the other side.” (T. III, fols. 124 to 128).

James, being shown plaintiffs' Maps 2 and 3, is asked to designate the point where he crossed the swamp land upon his trip of May, 1871. Says he:

“From Goose Lake, I think, we traveled in a westerly direction across Sections 23, 22 and 21, and Section 20, in Township 27 south, range 22 East. I do not wish to state that those were the sections through which we passed at that time; but going from Goose Lake in a westerly direction would have taken us through those sections as near as I now know; we passed about through that portion; the maps we had showing the slough, through the centre of the swamp land, and to which I referred, were some printed maps; I don't know that I can describe them; we were looking for a place to camp, *and very anxious to find water at the time; this was in May, 1871; we were looking through the swamp for a place to camp.*

“Q. Did you find any indications whatever of a channel?

“A. None that we noticed.

“Q. I see on that Map, No. 3, that there are several channels indicated through these sections that you have described. Were those, or any of the channels of that description, there at that time?

“A. *We saw no channels whatever.*

"Q. Did you see anything to indicate that there ever had been a channel there?

"A. No, sir; my recollection is now that *it was plain tule land from one side to the other*; it was a very flat, even country; the tules had been burned off—the greater portion of them." (Fols. 136 to 138).

On cross-examination James says that the object of this trip in 1871, was to gain information of the country. (Fol. 256).

E. D. CROSS (for defendant), as we have seen above, crossed the body of swamp land somewhere in the neighborhood of Epperly's Hog Camp, during the spring freshet of 1876.

"Q. Did you strike any channel in crossing?

"A. No, sir; *we didn't strike any channel in crossing*; we went around in order to avoid the deep places.

"Q. Did you cross by your own direction, or how did you happen to be able to get around?

"A. I was in the company of Frank Epperly and several others; I can't say how deep the water was; there was some places deeper than others; in some places the water was shallow, according to the ground." (T. III, fols. 471-2-3.)

WILLIAM McFARLAND (for defendant), in October, 1877, crossed the Swamp Land District about three or four miles north of Dover's Camp. (Dover's is on Sec. 1, T. 29 S., R. 22 E.)

"Q. What did you find in crossing the swamp to the other side?

"A. We found a kind of trail made through the tules; that was all.

"Q. *Did you cross any channels?*

"A. No, sir.

"Q. *Any slough?*

"A. No, sir.

"Q. *Anything that had the appearance of either?*

"A. No, sir; *we went just right through the tules.*

"Q. *What was the character of the country?*

"A. *It was generally a level country right through the tule, all the way.*" (T. IV, fols. 1490 to 1493.)

On this occasion McFarland was guided across the swamp by Wible, one of plaintiffs' chief witnesses as to channels within the swamp. "There was three of us there," says McFarland, "the Sheriff and another party and myself. We stopped at Wible's Camp that night, and he showed us the way through.

"Q. You mean Wible's Headquarter Camp?

"A. No, sir; his headquarters at that time, not his present headquarter camp; headquarters of construction down at the canal. He showed us a part of the way how he could cross, and went along with us. (Fols. 1491-2.)

It seems that Wible also acted as cicerone to Mr. Schuyler through Buena Vista Swamp, in February, 1879. Though, on the trial of this case, Wible swore to several continuous channels through the swamp, he at that time told Schuyler that the channel through Weed Island was the only one within the swamp, and that even that was but a *blind channel*, and terminated near Bonestell's (Sec. 24, T. 29 S., R. 23 E).

J. D. SCHUYLER (for defendant), relative to that trip, is asked:

"Q. In crossing that body of swamp land, did you have any conversation with Mr. Wible about any slough or channel there?

"A. I had a general conversation about that country. I was seeking information with regard to the topography of the country at that time, and I was conversing with Mr. Wible on the subject at that time.

"Q. Did you, in the progress of that trip across there, come to anything in the nature of a slough, or channel?

"A. Yes, sir.

"Q. Whereabouts was that? (T. III, fols. 1557-8.)

"A. As I recollect it, it was south of the Bonestell house, about half a mile, or a mile.

"Q. Was there something in the nature of a channel which you crossed?

"A. Yes, sir.

"Q. Did you go up and down that, at that time?

"A. As I recollect, we crossed the channel and came to the swamp-land, at the east of it, and after passing down southeast of it we came to a bank, going on up, a little distance, striking it occasionally, as we drove along.

"Q. After passing that, had you seen any other channel through there?

"A. Not that I recollect.

"Q. Did you have any conversation with Mr. Wible at that time about the channels and sloughs in the body of the swamp-land?

"A. I did sir. * * * We were conversing about the character of the country all of the way along.

"Q. Will you repeat, as near as you can recollect, that conversation?

"A. I would find that a very difficult thing to do.

"Q. What did Mr. Wible say in reference to that channel there—did he say anything?

"A. He described it to me as a *blind channel, the most of the way; that it terminated beyond or near Bonestell's.*

"Q. He told you the channel terminated where?

"A. Near Bonestell's.

"Q. Did he say that that was the only channel in the body of the swamp-land?

"A. Yes, sir; that is how I recollect it.

"Q. You were seeking for information on that trip relative to the topography of the country?

"A. Yes, sir" (Fols. 1560 to 1563). "I was down here at that time in my official capacity as Deputy State Engineer" (fol. 1612). "The country was new to me, and I was asking questions about it of all sorts; getting information about it; trying to get all the information I could in regard to the character of the country. (Fol. 1613).

Your Honors will note that the point designated by Wible as the place where the slough terminated, is the same as that at which McCray, by his Maps B and D, shows it to terminate. Macmurdo, also, says the slough terminates at Bonestell's and can be traced no further.

W. R. MACMURDO (for defendant):

"Q. Do you know anything about Buena Vista Slough?

"A. Yes, sir; I am familiar with Buena Vista Slough from the lake down as far as it goes—as far as there is any slough. * * I have meandered that slough as far as there is any slough to be found—as far as the end. * * It ends on Sec. 24, T. 29, R. 23. * * I meandered a part of it in May, 1879, and a part of it, I think, was in 1880." (T. IV, fol. 1062).

Macmurdo is then asked to describe the slough.

"Q. Start about half a mile south from Wible's headquarters, and then trace the slough?

"A. About half a mile south—that would be in Section 23—it runs in a very crooked channel until it gets on Section 14, near the S. W. corner of Section 14, T. 30, R. 24. There the slough, when I meandered it, was dammed up by having a levee across it; a levee placed there to make one bank of the Kern Valley Water Company's Canal. I think it was about 10 or 12 feet high at that point; from the bottom of the slough it was about 14 feet, I think; 10 or 12 feet above the bottom of the canal. * * That levee was completely across the slough from one side to the other.

"Q. So that any water coming in the slough, when it got down there, would have to raise 14 feet above the bottom of the slough to go over the levee?

"A. I think it is about 14 feet. It would be a complete obstruction to any water continuing down the slough at that point. It would force the water to go down either the canal, or back it up toward Buena Vista Lake.

"Q. Is there any opening in the levee at the point where it crosses the slough?

"A. No, sir; I never saw an opening. Nearer Headquarter Camp there is a waste-gate." (Fols. 1064 to 1066).

"Q. After crossing the levee and going northward, will you describe this slough?

"A. This slough continues on pretty much the same character of slough. It is very crooked; gouged out in deep holes on the bottom; has perpendicular banks in places; continues on in that way probably a mile to the northwest; it continues that way to Section 15, until it reaches the north line of Section 15.

"Q. Continues how?

"A. Continues to run very crooked, and it has very deep holes along there, and it has well-defined banks until it reaches very nearly the north line of Section 15, T. 30, R. 24. There are ponds on the outside of the channel and *the water of the slough goes up in this pond there and into Section 15, between the channel and the bank of the canal.*

"Q. You say that it has defined banks. How are the banks as to height above the bed of the slough?

"A. *It is hard to tell where the bed of the slough is there.*" (T. IV, fols. 1067-8).

"Q. From the north line of Section 15, describe the slough through the next section, that is, Section 10, T. 30, R. 24.

"A. The slough, a part of the way, has good banks in there, and *it is very crooked, and the current is very sluggish, very slow. It has very little fall, and it has very low ground on both sides. There are places where the bank is very low, almost as low as the bed of the stream in places. On the east side of the slough the bank, as a general thing, is higher than on the west side.*

"Q. *The bank is as low as the bed of the slough itself?*

"A. Yes, sir." (Fols. 1070-1). "On the west side it is low, and it has a levee along that bank to keep the water from flowing out." (Fol 1072). "Through the

"balance of Section 10 the banks get lower, and continue to get lower until it gets up into Section 3. * * The banks there are lower, and there are hardly any banks to it at all. It would carry probably one foot of water along there without overflowing. * * It is not so crooked as through Section 10. It runs through a small portion of Section 3 only." (Fol. 1073).

"Q. From the north line of Section 10, to where it reaches the township line, please describe the slough?

"A. *The slough there is very shallow and undefined. It has banks in SOME PLACES, and they are very low, and IN OTHER PLACES IT HAS NO PERCEPTIBLE BANKS, and is very undefined.* The general course of the slough is northwest. It is pretty crooked and has a great many beds." (Fols. 1074-5). "Through Section 32, and a portion of Section 31, to the north line of 31, T. 29, R. 24, that portion of the slough was a well-defined slough, having banks probably two or three feet high." (Fol. 1075).

"Q. Will you look at the map and describe the remaining portion of the slough from the north line of Section 31, T. 29, R. 24?

"A. The slough there, has banks, but the banks from there begin to get lower, and the slough begins to get narrower and smaller and shows signs of decreasing in every way in its capacity. The tules are growing in it in places, but not entirely across. Then coming down from the north line of 31, same township and range, the slough has a defined channel from there through Section 25, T. 29, R. 23. The channel is still very crooked, and is getting smaller all of the time to the north line of Section 25, and the balance of the slough through Section 24, for about half a mile, has very low banks. *The banks get lower as you go north, until finally it runs out in the tules, and there is no appearance of a channel. The water spreads out all over the tules there—the swamp. THERE IS NO APPEARANCE OF A CHANNEL ANY FURTHER. We were unable to trace it any further—any defined channel.*" (Fols. 1075-6-7).

" Q. From Section 4, northward, when did you finish meandering?

" A. In 1880, I think, about May—April or May—I think it was.

" Q. When you reached the end of the slough in Section 24, did you go any further north at that time?

" A. Yes, sir; I went northwest and northeast; but the water was flowing out all over the country so that I could survey no further. I went as far as I could trace out the channel—that is as far as I could perceive any channel at all.

" Q. When were you down on the slough again from Wible's Headquarters, northward?

" A. I think I was there again in September or October, 1880. The slough at that time was dry."

(Fols. 1079-80). "After I made the survey of that slough in May 1880, I went back again in October. I went along there on the east side of the slough. I went along Sections 33 and 32 until I reached the bank at about the south line of Section 32, T. 29, R. 24. * * I crossed Section 32 at some point and got on to the west side and went from there to Bonestell's house. From Bonestell's house I went northwest probably a mile, not following the slough. We went pretty close to the slough, and then we went northwest up this swamp, and after we got probably a mile we turned and went east to the margin of the swamp. After going a mile from Bonestell's northwest, we turned and went east to the margin of the swamp.

" Q. Whereabouts is Bonestell's house; do you know?

" A. The house is on the southwest quarter of Section 24, T. 29, R. 23." (Fols. 1085-6-7). "One reason I went down there was to see if there was a channel down in that part of the swamp. When I was there before, the whole country was filled with water, so that I could not see it. The country was dry at the time.

" Q. Did you find a channel there then?

"A. No, sir;

"Q. None whatever?

"A. No, sir; nothing that you could call a channel. "there was one place that we crossed a pond; it was "a basin; it was dry entirely; a kind of a basin; no "appearance of a channel.

"Q. You found no channel going through there at "all?

"A. No, sir; I found the condition there to be the "same as when it was wet." (Fols. 1088-9.)

"Q. Suppose you turned in 100 cubic feet of water "per second from that waste gate near Wible's Camp, "how would that water flow, from your observation?

"A. Well, sir, a part of it would go down the "slough. I think *the great part of it would flow over "the sides of the slough, over the banks, and spread out "over the country, all through the tules. All that went "through the channel running through Weed Island "would go beyond Bonestell's a short distance, and "then would spread out in the tules, and spread all over "the swamp in every direction.* (Fols. 1182-3).

In the early part of 1881 a number of defendant's witnesses made a thorough exploration and examination of all that portion of Buena Vista Swamp north of where the "traceable channel," mentioned in Finding 71, disappears at or near the Bonestell Place, in Sec. 24, T. 29 S., R. 23 E. They crossed and re-crossed the swamp many times, and in all directions. They crossed it from side to side where it was absolutely dry; and they crossed it where the waters were spread over its surface from the high ground on the east to the high ground on the west. They were not all making their explorations together, but were going about in twos or fours, in different directions and on different occasions. They found many sloughs, hollows and depressions interspersed throughout the swamp and lying in all directions, but such sloughs, hollows and depressions had no continuity or connection one with another, and neither constituted nor formed part of a natural stream or water-course. By the testimony of

these witnesses, it is conclusively established that there is not anywhere within the swamp, a continuous or connected channel through which water will flow. So absolutely convincing is their testimony, that plaintiffs, appreciating its immense importance, have attempted, in their Points and Authorities, to detract from or lessen its weight by a puerile attack upon the credibility of the witnesses, on the ground that many of them are or have been employees of Messrs. Haggin & Carr.

Properly, we should insert here the entire testimony of these several witnesses, but as our space does not permit of that, we will present, in condensed form, the testimony of two or three of them, and refer your Honors to the volume and page of the Transcript where that of the others is to be found.

FIRST TRIP.

The first trip or exploration through the swamp was made April 14th and 15th, 1881, by Murray F. Taylor, H. A. Jastro, E. D. Cross and Vining Barker.

MURRAY F. TAYLOR (for defendant):

"We went to the Buena Vista Ranch the afternoon of the 13th of April (T. III, fol. 380). Stopped there over night. Next morning went from there * * down by Wible's Headquarters, and followed the canal down, between the canal and the swamp land, * * to Crocker's Hog Camp.

First Crossing:

"From Crocker's Hog Camp we went in a northerly direction, and then crossed the swamp. After traveling in a northeasterly direction we went further towards the east, and crossed the swamp in the neighborhood of Round Corral. We crossed the swamp completely. In front of the house of the Crocker Hog Camp the water appeared to be deep (fols. 385-6); —that water came out of a break in the canal (fol. 391); there is a break in the canal down there somewhere;

“the break was, I should think, on Section 21, T. 28
 “S., R. 22 E. that is three or four miles from Dover’s
 “(fol. 447)—There was a large hole of water there”
 “(i. e., at Crocker’s Hog Camp), “I attempted to drive
 “around it, but after going I suppose half a mile—I
 “didn’t know how much further it would go—I conclu-
 “ded to go back and get Mr. Estee, whom I had left at
 “this house, to go with us and show us the way across
 “the swamp, as I was not familiar with the country
 “then. We got Mr. Estee to go with us. By bearing still
 “further down towards the north, we went around the
 “water. This water was apparently spreading out on the
 “west side of this water-hole or slough, or whatever it
 “is, spreading out on the level land; and we drove
 “through the water some distance in a buggy. It was
 “not over 3 inches deep. We drove a considerable
 “distance through there; then, after driving through
 “there, we went around the water-hole and found
 “no more water. I suppose where we crossed it, the
 “water had spread out *at that depth* 100 yards, prob-
 “ably more.

“Q. *In crossing it did you find any channel at all?*

“A. *No, sir; it was as flat as this floor. I don’t think
 “there was half an inch difference in the depth of the wa-
 “ter, in the whole of it. After getting across it we
 “went eastward, and there were one or two of these
 “holes which we passed around in this trip across the
 “swamp. We did not cross any more. There was
 “one, I recollect, had a little water in it, and we drove
 “around that. We may have crossed one or two that
 “were dry, but by just meandering a little we could get
 “around them without driving over them at all.” (Fol.
 387 to 389).*

“Q. Did you find any channel at all?

“A. Nothing but these little water-holes that we
 “drove around without any trouble, We could always
 “drive around them. There was one that I recollect
 “in the course that I crossed near the end, but it was
 “not as far from it as it is from here to the end of this
 “room; you could see that that was the end of it.

“*There appeared to be no connection at all between those different holes* It struck me at the time that it was impossible to be a connection there between the water, for the hole that was in front of the house (Crocker’s Hog Camp), about half a mile north of the house, was backed out into the high land towards the west. We were on the west side of that water-hole, and the water was backing out there and into the flat level land.” (Fols. 590-1).

Second Crossing:

“From the Round Corral I went to the Tule Shanty;
 “ * * *There was no channel that we crossed between the Round Corral and the Tule Shanty.*
 “Just before we got to the Tule Shanty there was a little swampy looking land without tules on it, but it had a green appearance. *It was not a channel, but just a flat country.* * * I am Superintendent of the Stockdale Ranch. I irrigate the entire ranch. I attend to the irrigating myself. It is under my personal supervision. I have seen water turned through my ditches for the purpose of irrigation for the past four years, and have seen how the water runs and spreads out. It will seek the lowest places and there it will spread out over the land. I am accustomed to judging of different grades and levels with my eye. Have a great deal of that to do.

“Q. In speaking of these flat places which you crossed in going from the Round Corral to the Tule House or shanty, were there any indications there that it was a place where water usually ran?

“A. No, sir; it had the appearance, to me, of a place where water would back, in case the low lands to the west of it were full of water. It seemed to me that water would back up there; no water would run. “It would simply back.” (Fols. 392 to 395).

“Q. Did you find any water at the Tule Shanty?

“A. Yes, sir; there is a large excavation there. “The water, I suppose, is about 300 feet wide on the top. It was stagnant water.” (Fol. 392).

"After reaching the Tule House we went south
 "a short distance, and then drove across the swamp;
 "in a southwesterly course; I should think nearly
 "due west; a little south of west. The Tule House
 "was on the southeast side of the body of water of
 "which I speak.

"Q. Was the water in a channel of any sort?

"A. Yes, sir; there is a channel there. The water
 "terminated there near the Tule House, and in going
 "south from the Tule House there is a depression in
 "the land there, very gradual, and it is, I suppose,
 "100 feet wide. We crossed that depression, and
 "went west, or a little southwest, may be.

"Q. *After leaving that depression, did you come to any
 "other depression or channel?*

"A. *None at all. I drove then across the swamp to
 "the high land.*

"Then turned to the south; and in following the edge
 "of the swamp up I came to the slough—a dry slough
 "at that point; followed that up on the east bank for
 "three miles, I suppose. Sometimes there would be
 "water in it; sometimes there would not be any. After
 "going three miles I came to what I thought was the
 "end of it. It was very gradual there. If there was
 "any channel at all, it was so indistinct that I did not
 "think it was worth while to follow it up any further."
 (Fols. 395 to 397).

"Q. How far was that from the west margin of that
 "slough?

"A. That channel?

"Q. Yes, sir.

"A. It seemed to be right on the west boundary of
 "the swamp land. A short distance to the west,
 "there was high alkali sage brush. There was no
 "channel between that and the west boundary of the
 "swamp land; none that I saw." (Fol. 398).

Third crossing:

After following this channel on the west margin of
 the swamp to its end, Taylor then recrosses the

swamp to the Round Corral. "We turned then," says he, "and went towards the east, towards the Round Corral. * * It was getting dark when I drove over there, and I did not perceive any" (channel) "at all going to Round Corral. At the Round Corral we went into camp and stayed there that night." (Fols. 937-8).

Fourth Crossing:

"The next morning we started for Goose Lake, and after crossing Goose Lake * * we crossed the swamp from the end of Cox and Clarke's fence to Dover's. We traveled right for Dover's.

"Q. Did you come to any channel in there?

"A. There was a little water-hole there that we drove around. It was on the east side of the swamp. After driving around that we found nothing else until we got to Dover's. The water-hole on the east side of the swamp, that I speak of, I should suppose was a foot deep. There was three or four inches of water in the bottom, and about thirty feet on the top; sloping down very gradually; very much as a saucer would slope. It was nearly flat. The water was left in the bottom, and was three or four inches deep. We crossed that hole from east to the west. The larger portion of that hole was to our left, to the south, and where we crossed it, we could see the termination of it. We were about as far from it as from here across the room. It came to an abrupt termination at the north.

"Q. Then I understand you to say that in crossing from there over to Dover's you found nothing indicating water?

"A. From that point, no, sir. The hole indicated simply a water-hole, *as we frequently met there in the swamp. It was a hole that would hold water, and had no outlet at all.* We could see the end of the place. We were not more than thirty feet from the northern end."

"Just before we got to Dover's house we went out to the well. There is a pump there, probably about

“a quarter of a mile from Dover’s. We drove
 “to the road that goes to Dover’s. * * We did
 “not go quite to Dover’s house. We went, I should
 “think, within two hundred yards of it, and from that
 “point we could see high ground all of the way, and we
 “stuck the road and went into it. No depression there;
 “perfectly level from there to Dover’s house. No chan-
 “nel there at all. (Fols. 399 to 402.)

Fifth Crossing:

“From that point we struck off towards this well and
 “pump, situated in the tules 300 or 400 yards away
 “probably” (fols. 402-3). “After we got there, * *
 “we struck nearly due east across the swamp again”
 (fol. 402). From the pump “we turned a little south
 “of east, and went on across the swamp coming to
 “the high land.

“Q. In crossing the swamp there to the high land,
 “did you find any water?

“A. Just before we got to the high land there was
 “a hole that we drove over. We drove near the north
 “end, and within 20 feet of the south end of this hole
 “or depression; there was no water in that, if I recol-
 “lect right, but there was a little mud towards the north.
 “I could not see how far it ran, but towards the south
 “we could see that it had just begun. *It came to a*
“point just as the prow of a boat would come, and was
“shaped something like a boat. The banks were steep
 “and came to a point in this way (showing), and you
 “could just see the level land beyond. There were lit-
 “tle alkali mounds all through there. Where that
 “pump was there was alkali and salt grass growing
 “on it.

“Q. Crossing the swamp land then from Dover’s to
 “high ground on the east side of the swamp land, was
 “that the only depression, this hole?

“A. This was the only place I noticed in the trip
 “across there that had any water in it, or that had any
 “marks of a channel. There was one place on that trip
 “that we left to our right, and we did not change our

"course at all, but we left it to our right—to the north.
 "It seemed to be a depression there, but it had no
 "water in it. After reaching the east side we just fol-
 "lowed up the high sage-brush land until we struck the
 "road, * * and followed it up to the McClung ranch."
 (fols. 402 to 405.)

H. A. JASTRO (for defendant):

"From Wible's Headquarters we went * * along
 "the canal to Estee's Hog Camp. That is south of the
 "adobe holes; probably about a mile from the adobe
 "holes." (T. III, fol. 364.)

Estee's is the same as Crocker's Hog Camp.

First Crossing:

"From Estee's Hog Camp we went * * north-
 "ward there, and then across the swamp.

"Q. *Did you find any channel in crossing the swamp?*

"A. *No channel that I could see. I crossed to Round
 "Corral. We found holes containing water. We
 "went around those holes in crossing over to the corral."*
 (Fols. 364-5).

Second Crossing:

"We went from Round Corral to the Tule Shanty, and
 "in a straight line on the margin of the swamp. We
 "found no water; not the way we went.

"Q. Did you cross any channel at all?

"A. No. You see we kept on the same side of the
 "swamp going there. From the Tule Shanty we
 "crossed the swamp probably 100 yards from the house
 "going over west; in a southwesterly direction, you
 "may say.

"Q. Did you find any channel through that coun-
 "try?

"A. No, sir. To the north of the Tule Shanty there
 "is water. North of the house there is some water.

"Q. Did you find any indication of a channel at the
 "Tule House?

"A. No, sir.

"Q. You found water, you say, there?

"A. Yes, sir. In a big hole right there near the
 "Tule Shanty. From the Tule Shanty, we went across
 "the swamp land southwesterly, and struck the slough
 "on the west side of the swamp. We traced that
 "southerly, probably about three miles. *I did not*
"trace it further because there was nothing more to trace.
"The water ran out. It was a level country there like a
"swamp generally looks." (Fols. 365 to 367).

Third Crossing:

"We then crossed the swamp back again to the
 "east side, and to the Round Corral.

"Q. *Did you cross any channel at all?*

"A. No, sir." (Fol. 368).

Fourth Crossing:

"We went from Round Corral to Goose Lake, and
 "from Goose Lake to Cox & Clarke's fence, and then
 "crossed the swamp to Dover's house.

"Q. In crossing over to Dover's, did you find any
 "channel at all?

"A. Found water in holes; several holes there; the
 "water standing in holes. *These holes were not connec-*
"ted, because we drove around them.

"Q. *Did you drive around them without going into*
"any channel at all?

"A. No water, yes, sir. No depression in the ground
 "from one hole to the other. *The country was level, ex-*
"cept some alkali knolls and here and there some high spots.
"some of them were alkali, some of them were salt grass."
 (Fols. 368-9).

Fifth Crossing:

"We re-crossed the swamp from Dover's towards
 "Broder's Island. In crossing we found water. It
 "was not running. It seemed to be standing in the slough,
 "It was very muddy; a sort of a slough that we crossed;
 "there is standing water. That water was not very
 "deep. I suppose it was about knee deep to the

“horses, and not to exceed 25 feet wide. I saw the
 “end of that water northward. * * We crossed
 “then and went to Broder Island. We met no other
 “water, and saw no other channel or hole. From
 “there we struck across to the Button Willow Slough
 “ * * Did not go back to the swamp again.”
 (Fols. 369 to 371).

E. D. CROSS.

Direct-examination, T. III., fols. 473 to 486.

Cross-examination, *none*

VINING BARKER.

Direct-examination, T. III., fols. 611 to 622.

Cross-examination, T. III., fols. 623 to 624.

After describing his several crossings through the swamp, Barker is asked:

“Q. From wandering around the swamp land, did
 “you find throughout the whole length of it; did you
 “find any continuous channel running from south to
 “north, or north to south?

“A. No, sir.

“Q. Or in any direction?

“A. I don't think there was.” (Fol. 622.)

SECOND TRIP.

The second trip through the swamp was made on the 22d, 23d and 24th days of April, 1881, by Walter James, C. G. Jackson, M. F. Taylor and J. D. Schuyler.

WALTER JAMES (for defendant):

“I was last down on that body of swamp land, north
 “of Wible's camp, from the 22d to the 24th of April,
 “1881. I went there to make an examination of the
 “swamp and over-flowed land.

“Q. What was your object in making an observa-
 “tion of the swamp and overflowed lands?

“A. To determine whether there was any water-

"course running through it. I went there to hunt for channels; went there for the purpose of finding out whatever channels might be found; whether there were or were not channels." (T. III, fols. 185-6.)

"I first struck the body of swamp land at the south end of Goose Lake on Sec. 29, T. 27 S., R. 23 E., and then went around Goose Lake northwesterly along the margin of the swamp to the Tule House, Sec. 32, T. 25 S., R. 22 E." (T. III, fols. 186 to 188.) "From Goose Lake to the northwest corner of Sec. 3, T. 27, R. 22" (that is, to about the Round Corral), "we had a high sage-brush country to the right, and low tule lands to the left" (fols. 188-9.)

First Crossing:

"In going from the northwest corner of Sec. 3 northward to Sec. 10, T. 26 S., R. 22, we crossed a body of tule land. We crossed no channel in that body. * * There was nothing at the point we passed through to show a water channel through there. There was nothing to define the course where water had been flowing in any particular course; nothing whatever. From Sec. 10 to the Tule House is level tule land; no channel through it; some salt grass islands in the tule land and alkali spots. At the Tule House there was a slough, wide and deep; a well defined slough, I should say 100 feet wide and 10 to 12 feet deep. We traveled down that slough in a northerly direction, through Sec. 29 and through 20. * * My recollection is that the slough terminated on about Sec. 20, T. 25 S., R. 22 E.

"Q. You say it terminated at about Sec. 20. How far from the Tule House was it that you followed it?

"A. A distance of a mile to a mile and a half. I mean by terminated, *it could not be traced any further. It goes out on the flat land. The slough disappears*" (fols. 189 to 193). "From the termination of this slough we traveled westward * * * to some point on the high land on Sec. 23 or Sec. 26. In going from the

“point we left on Sec. 20, and the end of the Tule
 “House slough, to this high land on Sec. 23, T. 25, R.
 “21, we found no channel. No indication of a channel.
 “The country was a flat tule land” (fols. 192 to 194).

Second Crossing:

“From that point we traveled northward, not keep-
 “ing any reckoning, say about eight miles to the north,
 “and come to what seemed to be a dry lake bed, no
 “tules growing.

“Q. Did you find any channel on that trip of eight
 “miles to the northward?

“A. No sir.

“Q. You say it seemed to be a lake bed; what lake
 “bed?

“A. Tulare Lake. From there we travelled easterly.
 “We saw some cattle at some distance to the east, and
 “we went to where the cattle were, and there found a
 “slough. I should judge it was about Sec. 2, T. 25 S., R.
 “21 E. We found a large slough with some water in it—
 “standing water. From the point where we started to
 “go eastward to the point where we found this slough we
 “had found no channel, and it was level, even tule land.
 “At Section 2 the channel, I should think, was 100 feet
 “wide and 8 or 10 feet deep. *I followed that channel north-*
 “*ward a mile or such a matter. I followed it to its end. At*
 “*its end is flat, even land.* We then went some distance
 “further north, beyond the end of this channel, and
 “found *unbroken tule country, but no channel.* Then we
 “came back to the point where we had first struck this
 “slough, on Section 2, and followed it back. We came
 “back on the east side of the slough. In following
 “towards Tulare Lake we were on the west side; com-
 “ing back we came back on the east side. In going
 “north and coming back south we crossed no branch
 “or channel. The general appearance of the country
 “was flat—tule land. Having got back to the point
 “where we first crossed the slough, we started to follow
 “the slough northward. We then followed up the
 “slough, on the east side of it, from Section 2 to Sec-

"tions 12 and 13. About a mile and a half or two miles from this point on Section 2 *the slough disappeared at the southern end. It cannot be traced any further.* In tracing it we could see both sides of the slough, but saw no channel running into it or from it on the west side. We did not go around on the west side, but could see across it.

"Q. From there about two miles or two miles and a half, as you say, from Section 2, where this channel disappeared, at its south end, where did you go?

"A. Traveled some distance to the eastward. I should say we traveled to the eastward a mile or a mile and a half.

"Q. Well, what did you find? Any channel?

"A. *I saw no channel; passed over an unbroken tule country.* We then returned, in the direction of the Tule House; drove in the direction of the Tule House until we came to the bank of the slough.

"Q. The bank of what slough?

"A. On or about the north line of Section 29, Township 25 South, Range 22 East, I should judge, from the distance. We followed up on the west side of that slough to the Tule House. From where we struck it we saw no branch on the west side." (Fols. 194 to 199):

Third Crossing:

"Q. Now you have got back to the Tule House. What did you do next?

"A. From the Tule House I followed up the slough that is there at the Tule House in a southwest direction, and on the east side of the slough, say a mile, more or less. The slough was well defined—easily traced at that point; and we traveled in the bed of the slough a mile and a half.

"Q. That makes three miles. What did you find there?

"A. We found then we were near the western margin of the swamp and overflowed land, and we could see the high land from that point on the west side.

"Q. Now, from the Tule House, can you fix the point that you had gone to, on the map, or trace the course of the slough that you followed up from the Tule House?"

"A. It would be impossible to know exactly the route we traveled. The slough is crooked, winding about. We were going in a southwesterly direction, and the distance would bring us to about Section 1, T. 26 S., R. 21 E.

"Q. Do you mean the general direction that was laid down on this map, as the connecting channel between the east and west sloughs there, from 32 to Section 1?"

"A. I should judge that this map 3 represented the course, very nearly, of that particular part. My recollection is that it is more crooked than it is represented on the map.

"Q. After you got to Section 1 what did you find?"

"A. There we found a depression or commencement of a slough running to the north. We did not follow it." (Fols. 199 to 202).

[But Taylor did follow it. Taylor says, that he crossed from the end of the Tule House Slough westward to Section 35, T. 25 S., R. 21. (T. III, fol. 411). "We struck the high land," says he. "probably adjoining Section 34; then traveled half a mile southeast; then a short distance due south and came to the end of a slough where it had run out, where you could see it was spread out in the flat land. I then followed the slough up probably half a mile south into Section 1, T. 26, R. 21, and stopped and took lunch." (Fols. 412-13). He then went northward toward Tulare Lake and back again to the Tule House. The next day he traced the Tule House Slough southwest to about Section 13, T. 26, R. 21, where "it forms a junction with the slough on the west side. I had an idea," says Taylor, "that this was the slough we had touched the day before; consequently I followed it in all its windings until I got to the place where we lunched on Section 1," (fols. 425-6). He had previously stated that it disappeared half a mile north from that point].

James continues:

"The slough from Tule House to Section 1 was of various depths. The greatest depth is down at the Tule House, where it is ten or twelve feet; the least depth, I should say, two feet. In some places it had *no defined width*; in some places, fifty, sixty or one hundred feet.

"Q. What do you mean by no defined width?

"A. The slope of the banks being so gradual, *it was impossible to say where they ended.*" (T. III, fols. 203). "After reaching Section 1, we traveled southward along this slough that we had followed up from the Tule House, I should say half a mile.

"Q. Can you fix that point on the map?

"A. I should say it was about Section 12, T. 26, R. 21. *There the channel disappeared—could not be traced any further. The general condition of the country was even, level tule land. There was no indication of a channel there to the south.* From there we traveled to the west along on the margin of the swamp and overflowed land, I don't know exactly how far; two or three miles. Saw no sign of a channel in that two or three miles. The end of that two or three miles, I should say, was about Section 31, T. 26, R. 22" (fols. 205-6.)

Fourth crossing:

From about Section 31, T. 26, R. 22, "we crossed to the high land on the east side, at a point on Section 33, T. 26, R. 22" (*vide fol. 209.*) "We crossed from the west margin of this swamp land across the body of swamp land, to some point on Section 33, T. 26, R. 22.

"Q. What was the appearance of the country there, in crossing that body of that swamp land?

"A. *Tule land from one side to the other; generally even.*

"Q. *Did you find any channel?*

"A. *No channel at all. Nothing to indicate a channel; nothing whatever. We completely traversed the whole body of swamp land, from one side to the other.*

"Q. *And you found no indication of a channel?*

"A. *None whatever.* (Fols. 206-7.)

"From Section 33 we went to the (Round) Corral near the center of Sec. 3, T. 27, R. 22. Found no indications of a channel between those two points; we traveled along the margin of the swamp land between these points; saw no water" (fols. 209-210.)

"From the Round Corral we traveled south through Sections 10, 15, 22, 27 and 34, T. 27, R. 22. Didn't see any channels or sloughs on that course. On that line, from the margin of the swamp and overflowed land on the one side to the other margin on the other, it was generally uneven (? an even) country; saw no channel at all through there." (Fol. 210.)

Fifth Crossing:

"From Section 34, T. 27, R. 22, I traveled southward into Section 10, T. 28, R. 22, through Section 3, to some place near the western portion of Section 10.

"Q. Did you find any channel through there?

"A. No, sir. Going from that point we found no channel. It was the same appearance of country. At that point we found water. We could not travel any further in that direction on account of the water.

"Q. Was there a channel there?

"A. No, sir; *the water was spread out over the country.*

"Q. *How wide was that body of water?*

"A. *A mile and a quarter or a mile and a half; just spreading over the country,* FOLLOWING NO DEFINED COURSE, BUT SPREADING OUT GENERALLY. We stayed all night at that point, and in the morning I crossed over the water in a southwesterly direction through Section 9 and a portion of Section 10, T. 28, R. 22. *I found no channel in crossing through there.* Crossed right through to the western margin of the swamp land; came right out near the bank of the Kern Valley Water Company's Canal, on about Section 8, T. 28, R. 22. Crossed over completely to the western boundary of the swamp land and found no channel

"through there—water all the way. In some places moving and in some places it was still. It was generally spreading out." (Fols. 211 to 213.)

"Q. In going through that water, what did you find the profile of the country to be? Give me the depth.

"A. From leveling, the greatest depth of the water being a foot and a half, and the shallowest all the way from almost nothing to a foot and a half.

"Q. What appeared to be the current in the different parts, or was there any current in this body of water?

"A. There seemed to be the greatest current in the shallowest places; not the shallowest; but the greatest motion was where the water was from four to six inches in depth.

"Q. It was there running with the greatest velocity?

"A. Yes, sir.

"Q. Was there much velocity to this water?

"A. It was quite perceptible. I could see the motion among the tules.

"Q. In what particular parts do you mean?

"A. In different places.

"Q. Did you see the same velocity throughout the deep places, as well as in the shallow places?"

"A. The least motion seemed to be in the deeper water" (fols. 224 to 226). "After reaching the western side of the body of swamp land in Sec. 8, we came back to the camp on Sec. 10, where we started from. From that point we then traveled eastward, or a little north of east, to some point about Sec. 2, T. 28, R. 22, on the eastern margin of the swamp; then ~~we had made a crossing from the west to the east of~~ *we had made a crossing from the west to the east of the body of swamp land, and we found no channel through there.*

"Q. I didn't ask you whether you found any on this point from Sec. 10 to 2. Did you find any?

"A. No, sir, no channel; there was some water on the portion of the section. The water we saw *was running all southward*. I didn't find out how it got there to run southward" (fols. 213-14).

Sixth Crossing:

"From Sec. 2 we traveled southwesterly through Sections 11 and 13, T. 28, R. 22. We found along there a flat tule country; no channel; no water." From Sec. 13 James goes to the southeast corner of Sec. 24, T. 28, R. 22. "We had crossed no channel or depression up to that point" (fols. 214-15). "From that point I traveled southwest through Sec. 35, T. 28, R. 22."

"Q. Was there any channel through there?"

"A. No channel between those points."

"Q. No indication of a channel?"

"A. No, sir; no indication of a channel."

"Q. From that?"

"A. Through Sections 25 and 35. I reached the western side of this body of swamp land near the bank of the Kern Valley Water Company's canal."

"Q. You found no indication of a channel?"

"A. No, sir."

"Q. Did you see any water?"

"A. I don't remember. I may have passed in sight of some water, but I did not cross any water. The general appearance of the country is very level, and tules" (fols. 215-16).

James then follows the road along the west margin of the swamp southward, past Dover's, to about the centre line of Sec. 12, T. 29, R. 22.

Seventh Crossing:

"From Sec. 12 we traveled east, through Sections 7, 8, 9 and 10, T. 29, R. 23. I went due east."

"Q. Now, from that point in Sec. 12, on the western margin of the swamp land, describe what you saw and found. *Did you find any channel in that course?*"

"A. No, sir."

"Q. *No indication of a channel?*"

"A. No, sir."

"Q. *Any appearance that a channel ever had been there?*"

"A. No, sir; with the exception of some salt grass

“and alkali islands, *it was one level and unbroken flat, covered with tules*. We went completely across the body of swamp land in that course, and come to the high land on Sec. 11.

“Q. And no indication of a channel?

“A. No, sir; we saw some water, but did not cross it, at some place about Section 8, I should say—standing water ponds; we could see around them.” (Fols. 219-20.)

“Q. Was there any reason for your selecting that particular point for crossing this swamp—the line just south of Dover’s?

“A. Yes, sir. I had a map of that portion of the country, which showed no channel in that portion of the swamp and overflowed land. It was a tracing of a map that I had. It was a map showing the topography of that portion of the country from Wible’s Headquarters down to about Dover’s. I had seen the map at the Bellevue Ranch, and the same, or a similar one, in this Court.

“Q. Is that the map which you refer to? (Map D, showing the map.)

“A. That is a map similar to the tracing I refer to. I had a tracing of this map. I believe, from the representations of that map, that there was no channel at that point. My idea of crossing there was from what was shown on this map” (fols. 221-2).

“Q. Then you made crossings at other places further north, from time to time, on this trip that you had taken through this country. What was your reason for going across at that particular point?

“A. At the most northerly place where we crossed, I simply followed up the channel from the Tule House until it disappeared. I could not follow that any further. I did not see any more of it. And that point seemed to be a kind of flat or tule swamp from which these channels start, going out towards Tulare Lake.

“At the two other points where I crossed I had no information at all; I merely conjectured that I could cross the Tules at those points. I selected the other

“two places at random; just selected any line that I
“happened to be on.

“Where the water spread out, I thought it would be
“a favorable place to get a profile of the country by
“going through the water” (fols. 223-4).

M. F. TAYLOR (for defendant).

“I left home, the Stockdale ranch, on the evening
“of the 21st of April of this year, and went to the
“Lone Willow, that night, about a mile south of Goose
“Lake and camped there. The next day we followed
“the road to the Round Corral. “There was no water
“in Goose Lake. I could not tell the lake except for
“the dead tules. You could see the remains of some
“dead tules there. It was perfectly flat; and not
“perceptible to the eye that there was any depression
“at all. Passing Goose Lake, we went down to the
“Round Corral, which is on Section 3, T. 27, R. 22.
“We went along the edge of Goose Lake and the
“swamp. We could see the tules on the left, to the
“west of us, and high alkali sage brush land to the
“right.” (T. III, fols. 406 to 408).

First Crossing:

“From the Round Corral we went to the Tule
“shanty on Section 32, T. 25, R. 22. Found water
“north of the Tule Shanty; stagnant water. After
“reaching the Tule House we traveled down the
“slough on the bank of which the Tule House
“stood; * * went about a mile. * * About
“a quarter of a mile from the house we crossed
“over to the west bank, then we followed this slough
“down. At the point where we crossed, it had about
“a foot of water in it. It was about thirty feet wide;
“the banks were about two feet below the surrounding
“country. * * In crossing that slough we followed
“the course down, as I thought, through the edge of
“Section 20, T. 25, R. 22. Upon reaching this point
“in Section 20 the slough had run out entirely, and we
“had come out on flat tule land. There was no sign of a

"depression or sign of a channel or slough of any sort.
 "The ground was perfectly level, and from the time we left
 "the Tule house the slough had been diminishing in depth
 "and width the whole time, until we got to the flat land on
 "about Section 20. After reaching this point I struck
 "off in a southwesterly direction, into Section 35, T.
 "25, R. 21. In going across there I came to no channel
 "at all. Sometimes I would come to a little dry pool;
 "and once we passed one of those pools with some
 "water in it, which we left to the south of us. We
 "crossed no channel at all. Occasionally we came to
 "little high alkali land, set apart with salt grass
 "growing on it, perfectly white.

"Q. What was the appearance of the country?

"A. Just as flat as this floor, so far as I could see. We
 "struck the high land, probably adjoining Section 34,
 "after having completely crossed the tule land from
 "Section 20." (T. III, fols 408 to 412).

"Then we turned and traveled a little southeast, I
 "suppose a half a mile, and came into the swamp, and
 "turned up the swamp almost due south; after travel-
 "ing a short distance, we came to the end of the slough
 "where it had run out and we traveled on perfectly flat
 "land through the tules, and came to the end of this
 "slough where you could see that it was spread out into
 "the flat land. I then followed the slough up, probably
 "half a mile south, and into Section 1, T. 26, R. 21,
 "and stopped and took lunch. We were still on this
 "channel or slough that I speak of, when we lunched.
 "The slough was still there, but we had struck it at
 "its northern extremity, about half a mile, I should judge,
 "above that point. After taking lunch I crossed to the
 "west bank of this slough, finding it at that point,
 "about twenty feet wide, and six or eight inches of
 "water in it, banks sloping a little. We traveled then
 "on the edge of the swamp land, and struck the road
 "on the west side of the swamp land. After striking
 "the road, we drove, as near as I can judge, diagonally
 "across Section 27 into Section 16, T. 25, R. 21, out-
 "side of the swamp land, on high land. There is a
 "road there." (Fols. 612-13).

Second Crossing:

"After going to Section 16, as near as I can locate
 "it by the distance, we struck then north, up into some
 "of these sections (showing on Map 3), and beyond the
 "limit of Map 3. After getting outside there I turned
 "almost east. Off to the east, about a mile and a half
 "from where I turned, we found a slough 60 or 70 feet
 "wide, and 2 or 3 feet deep, with standing water in it
 "at places. We followed that slough up to the north,
 "on the west bank. After following it, I suppose a
 "mile, we came to what seemed to be a lake bed.
 "There was no vegetation in it, it was perfectly flat.
 "*Between the point where we struck it, and the lake bed*
 "*there were no branch sloughs running into, or out of it.*
 "The general appearance of the country was flat, and
 "grown over with tules. After reaching the lake bed,
 "I turned west from the mouth of the channel we had
 "been following down, and drove entirely around the
 "lake. In making this circle, *I could see no outlet at all.*
 "there was no break in the tules. It seemed to be an
 "impenetrable mass of tules." (Fols. 414 to 416).
 "After going around the lake, we came back to the
 "entrance to this slough, on the east side, and followed
 "the slough up; and it seemed to me that we were
 "traveling south almost entirely. We followed the
 "slough up from the lake bed I have described, about
 "three-quarters of a mile, I think, before the water
 "ceased entirely. There was water in the slough in
 "little places, but it was not a continuous water channel;
 "but you would come to water, and then a little break
 "in it, and then you would come to some more water;
 "we followed it up three-quarters of a mile, I think.
 "We continued up the west side of the slough for two
 "miles, going southward. We may have been going a
 "a little east of south, but in a southeasterly direction
 "*There, it had just no beginning at all; it (?I) just drove right*
 "*out in the tules and you could find nothing further of it. It*
 "*disappeared entirely.* In going along this slough from
 "the lake, we followed right up the slough, and we could
 "see the west bank of the slough. We could see it all of

“the way. After we got above the water, we drove in the middle of the slough. *There was no branch, nor inlet, nor outlet at all.* I was looking for it, but did not discover any.” (Fols. 417-18.)

“After coming to the end of that slough, I bore off to the southwest, and continued following that course until I struck the trail that I had made in the morning. * * When we did that the Tule House was in sight, and I went to the Tule House and camped.” (Fols. 418-19).

“The next day—I had noticed, about a quarter of a mile from the Tule House, just before I crossed the slough upon which the Tule House was situated, that there was a dry channel or bed of a slough, or whatever you call it. It seemed to run almost in a due easterly course, about a foot and a half higher than the bottom of the hole that we were traveling down; I mean the bottom of the Tule House Slough. * * I wanted to find out where that slough went to, and we went to the point where it intersected the Tule House Slough. We were then on the east side of the slough. After going to the point of intersection, I drove down the south bank of this slough, following its different meanderings, I suppose a mile and a half, and there, I suppose, according to my recollection of the position, it would bring me into Section 28 somewhere, T. 25, R. 22. About a mile and a half from where we struck the Tule House it was lost. There was a little basin right at the end of it, or a little clear place right in the tules. I drove along there, and then there seemed to be a big mound of alkali land, grown up with sage brush, which runs out just below that high ground to which I went—somewhere in the middle of Section 27, or at the intersection of 28 and 22.” (Fols. 420 to 422.)

Third Crossing:

“After reaching the Tule House that day, we traveled up this slough that the Tule House was on, a short distance, following south. * * * I traveled

“over the slough from the Tule House. I followed, I
 “suppose about 3 miles into Section 13. I think that
 “is about the way it runs, except that when it got to
 “this point it there forms a junction with this slough
 “which runs on the west side of the swamp, that is,
 “through Section 13, T. 26, R. 21.

“Q. In following up that there, were there any in-
 “lets, or outlets, or channels that branched from it?

“A. None at all that I could see. It just seemed
 “to run across and form a connection at this point with
 “this channel over on the west side. There were no
 “branches that I saw. After reaching Section 13 it
 “formed a junction with the slough on the west side.
 “I had an idea that this was the slough we had touched
 “the day before; consequently I drove down this
 “slough, following it in all its windings, until I got to
 “*the place where we lunched on Sec. 1.* That is about
 “two miles, I should judge. After reaching that place
 “where we had lunched the previous day” (he had
 “previously said that it terminated a short distance
 “north of there), “I just retraced my steps and
 “came back and followed this slough up to a point
 “on Section 13, where it turned off. Then I kept
 “on up until I got, as I supposed, on to Section 24,
 “going southward. Along in Section 24, *the slough*
 “*ran out, and, from the time we passed the point where*
 “*the Tule House slough joined this slough, we could*
 “*see that it was running out all the time. When we got on*
 “*Section 24, we could see that the slough was lost, and*
 “*disappeared entirely.* We then went southeast in the
 “same direction, and up in Section 25, I think it was,
 “there were two lakes, in Township 26, Range 21. I
 “found there two lakes that were disconnected. The
 “water of the lakes seemed to be on a level with the
 “land surrounding them. *There was no channel leading*
 “*into or out of them; none at all. I drove around them.*
 “They occupied two or three acres each, I think. After
 “reaching those lakes, between those lakes, we drove
 “across to the high alkali island, from which you could
 “look back ~~towards~~ the foot hills. (Fols. 424 to 428.)

Fourth Crossing:

"Then we struck a course southeasterly, I think, traveling through Section 30 into 32 and into 33, in T. 26, R. 22. Going across there, I found the country *perfectly flat*. Occasionally we could see little water holes, two or three of them we passed, either to the right or left, that had water in them. Saw some dry; and no appearance of water. *Did not cross these holes, but went between them. Did not cross any of them. Just kept on the level land all the time, on tule land. Crossed no channel at all.* Coming out here at Section 33, just in front of us, I saw a high ridge that was grown up with thistles; and we just followed the ridge, which carried us right out to the road which runs from the Round Corral to the Tule House.

"Q. That carried you across the swamp from the west side of the swamp on Section 25, to the east side of the swamp on Section 33?

"A. Yes; by 'swamp' I mean that whole body of tule lands." (Fols. 428-9).

"After reaching the high land we * * struck this road, which runs from the Round Corral to the Tule House. That was the same road we had followed before, and is on the east side of the swamp. We followed this road to the Round Corral. After reaching that I drove to a little water hole there and took lunch, I think a few hundred yards north from the Round Corral. After lunching we crossed a little depression right between there, where the Round Corral is and where we lunched, and tried to go right across the tules, across the swamp there. When we got out we found all these places were full of water. There was one thing I noticed about the water. Just along in these little holes there was one hole that I had passed around the south end of, which was not much bigger than this room. *It was flowing up from the north; the water from the north was coming south into this place.* We there struck the water and turned back. I did not see any channel, except in those little holes. There was a little pond that I drove

"around right at the foot of this place." (Fols. 429 to 431.)

"I then went * * to the southeast corner of Township 27, Range 22. After reaching that I went west two miles" (fol. 432).

Fifth Crossing:

"From the northeast corner of Sec. 3, T. 28, R. 22, I took a course, as near as I could tell, southwest through Sec. 3. After traveling I suppose about a mile or a mile and a half, we were forced out by the water. We were trying to get around this water; I did not want to go through it. I was afraid I would get into trouble, and kept driving along towards the south. By driving between these little lakes on the flat ground all the time, we came to what we thought was the centre of Sec. 10, T. 28, R. 22. When we got there it was night, and we camped. The water was right where we camped. We could see by looking westerly across the swamp that there was a great deal of water, and this water had forced us down from our course. I determined that I would go across there and see how the water was. The next morning I started across on horseback, and my horse bogged down after he had gone two or three hundred yards, and I came back and left my horse and started on foot and took a surveyor's rod with me, and just went through those Sections 9 and 8 to the high land near the canal, and right in sight of the canal, through Sections 9 and 8, T. 28, R. 22. From the time we left Sec 10, our camp, which was about the middle of the section, *I was wading through water and tules until I got over to the high alkali land next to the canal. The body of water was about a mile and a half across.*

"Q. How deep did you find the water at the deepest place?

"A. *The deepest water I crossed was one foot and a half by measurement; I had this rod in my hand, and measured it; I measured it all along as I crossed, and came out without getting wet over my knees. I was going from the east*

"to the west. I found the deepest place to be one and
 "a half feet. I noticed the deepest places that I
 "passed with a rod, and the deepest point that I struck,
 "just to my right, was a little open place that looked
 "like a lake, just to the north of where I crossed, and I
 "crossed just above this, and this seemed to be a little
 "depression going into the lake, and I measured that
 "place, and I had the rod in my hand, and one and a
 "half feet was the deepest water I struck on the trip,
 "with one exception. I stumbled in some sort of a
 "hole, and went down a little deeper; it was just one
 "leg; I just stepped down one foot into it; the other
 "foot didn't go down into the hole; it came very near
 "throwing me over. My reason for crossing there was
 "that I just wanted to find out how that water was; that
 "is the reason. I had only to examine the water and
 "see its condition. After going to Section 8, I went
 "back and followed the same course as near as I could,
 "because the tules were broken down by the trail I had
 "made through there; I did not want to make a new
 "track. I went back to my camp on Sec. 10" (fols.
 433 to 437).

"Then from Sec. 10 I went back * * to the quar-
 "ter-section corner on Sec. 3, T. 28, R. 22" (fol. 437).

Sixth Crossing:

"I then went through Sections 11 and 13 to the
 "southeast corner of Sec. 13, T. 28, R. 22. * * From
 "the southeast corner of Sec. 13 we traveled due south,
 "and came to the southeast corner of Sec. 24, same
 "township and range. After reaching that corner we
 "went diagonally across Sections 25 and 35 to the cor-
 "ner, and we found the corner post of Sec. 34, T. 28,
 "R. 22, where it corners there at the township corner;
 "we were traveling southwest then" (fol. 438.)

"After reaching this corner we came down to Do-
 "ver's; traveling southeast down the canal, stopped
 "at Dover's. There was only water there in a well; no
 "water-hole or channel; and after leaving there we
 "came down to about the middle of Sec. 12, still trav-
 "eling on the canal" (fol. 440.)

Seventh Crossing:

"We got to about the middle of Sec. 12, T. 29, R. 22, still traveling on the canal. Then we traveled in a due easterly course, going through Sections 7, 8, 9 and 10, T. 29, R. 23. * * In crossing there I found a dense body of tules from the time we turned off, a short distance from the road, after leaving the Dover House, until we got across to the high land on the east side. *We found no channel, but we sometimes found a lake or water-hole; generally they were dry. One or two of them had a little stagnant water in them, where hogs had rooted. Frequently we came to little alkali mounds or islands as it were, white alkali, covered with salt grass. We did not cross a single one of the lakes; we traveled between them. The country through there was flat tule land; we met no water through there. We crossed through that tier of sections completely across the body of swamp land from the west to the east. After crossing Sec. 10 we drove up opposite the Bonestell House and went into camp, and stayed there that night, and the next morning came home*" (fols. 440 to 442).

"The lakes or ponds which we found did not run or lie in any particular direction. We would meet them sometimes very unexpectedly, and generally you would just ride upon them, or the majority of them. I think there were just as many of them round as any other way. they seemed to have no particular formation or direction. There was nothing about them, taking those lakes all together, to indicate that they were a part of the water channel; no connected part of a water channel that I could discover" (fols. 442-3).

"Q. Now from your experience through that body of swamp and overflowed land, traveling around as you have done, can you state whether there is a channel through there or not?

"A. I WILL STATE THAT THERE IS NOT; THAT THERE IS NO CONNECTED CHANNEL THROUGH THERE" (fols. 443-4).

"Mr. James, Mr. Jackson and Mr. Schuyler were with me on this trip. Mr. Schuyler and myself went in one vehicle together.

"Q. Did you and Mr. James follow just in one another's track?

"A. Not entirely; we went around in different directions; occasionally we would separate. We were each of us making independent observations" (fol. 445).

C. G. JACKSON (for defendant):

Direct examination, T. IV, fols. 467 to 516.

Cross-examination, T. IV, fols. 552 to 567.

J. D. SCHUYLER (for defendant):

Direct examination, T. IV, fols. 810 to 841.

Cross-examination, T. IV, fols. 841 to 867.

At the close of his direct examination Schuyler is asked:

"Q. I will ask you now whether there is a continuous defined channel through that Swamp Land District?

"A. I can only speak of what I saw in the places I have been and at one or two of the crossings, perhaps three, that I made in the swamp. I SAW NOTHING THAT WOULD INDICATE A CHANNEL" (fols. 840-1).

THIRD TRIP.

This trip was made May 14th, 15th, 16th and 17th, 1881, by George F. Thornton, F. B. McClung, D. G. McLean, and H. A. Reading. Capt. Taylor and J. P. Murray were along, but they were not called.

F. B. McCLUNG (for defendant).

"We struck the swamp lands very near the Round Corral. * * After reaching the swamp lands at about the Round Corral, we went in a northwesterly direction (*vide* T. IV, fol. 465), about a mile and a half I should judge.

"Q. Did you find any water in the swamp?

"A. Yes, sir; there was water all through the swamp.

"Q. How far from the Round Corral before you found this water?

"A. The Round Corral is probably 300 yards from the edge of the swamp, and *the water is right on the edge of the swamp—the edge of the tules.*

"Q. Now will you describe what you did there, your courses, and what you saw after striking the water. After reaching the water what did you do?

"A. After reaching the water we drove out into it some distance. * * We drove out in the water some distance, and we found we had too big a load for our team. * * Then we came back to our camp near the Round Corral, and camped there Sunday night." (T. IV, fols. 423 to 425.)

First Crossing:

"The next day we followed the margin of the water by the tules about a mile, going southward. After that we drove across the tules. I should say about three miles across. We went on to the high ground on the west side of the tules. In going across these tules, we started from the high ground, on the east side, from the margin of the tules, and went in a due west course as straight as we could.

"Q. Did you find any water going through there?

"A. Yes, sir; *water all the way, except occasional islands.*

"Q. How large was those occasional islands that you speak of?

"A. Some of those islands, sir, had as much as ten acres; some probably didn't have more than half an acre.

"Q. How deep was that water, Colonel, that you drove through?

"A. A great deal of that water that we drove through was not to exceed six inches deep. *The deepest water that we found was probably two feet.*

"Q. In the whole trip across there?

"A. In the whole trip across there.

"Q. The deepest water that you found?

"A. Was about two feet—was just about up to a man's knees.

"Q. Were there tules growing through there?

"A. Yes, sir; *a solid mass of tules all the way through.*
 "There were occasionally little spots, not larger than
 "this platform where the tules did not grow, and there
 "were occasionally lakes where tules did not grow; but
 "the whole country was a mass of tules, with the ex-
 "ception of those islands and the lakes.

"Q. Can you account for the fact of the tules not
 "growing in those occasional spots that you mentioned?

"A. Some of those bare spots, I am satisfied, the
 "tules did not grow in on account of the alkali."
 (Fols. 425 to 428.)

"Q. Did you see any channel in crossing?

"A. I did not

"Q. Well, after reaching the west side of this body
 "of swamp land?

"The COURT—Excuse me. The witness testified
 "that he did not see any channel?

"Mr. HAGGIN—Yes, sir.

"The COURT—I would like to ask him a question
 "(to the witness). If there had been a channel there,
 "would you have seen it?

"A. I would, sir.

"The COURT—A person might cross there and not
 "look to see it.

"A. Yes, sir; I had my eyes wide open.

"Mr. HAGGIN—After reaching the west side which
 "way did you go?

"A. After reaching the west side, sir, we went on
 "to the high ground, the bluff or high land there, in
 "order to be certain that we were through the swamp,
 "and to look off in a westerly direction, to be positive.

"Q. And you are positive that you had completely
 "crossed the entire swamp land?

"A. Entirely, sir; and got on to the alkali hills
 "beyond the swamp." (Fols. 431 to 433.)

"We then came back, not exactly in the same course
 "that we went, but somewhere near the same course
 "that we went over. In coming back we found the
 "tules just as thick and the country very much the

"same. This return course was occasionally in the
 "same track of the course we had taken in going across.
 "Sometimes it might have varied fifty or a hundred, or
 "even three hundred feet. The tules were very large,
 "and we could not see where we would go, and we got
 "out of the course sometimes; could not see how far
 "we were out of the original course. *On this return*
trip the water was about the same depth. After we came
 "back we followed the tules up probably about three
 "miles on the margin of the water, and camped that
 "night.

"Q. You mean followed to the southward?

"A. Followed to the southward. Followed south
 "on the margin of the water.

"Q. Was there water all along?

"A. Water all along, sir. The water did not extend
 "to the edge of the tules in all the places, and we went
 "along to the margin of the water, and followed the
 "margin of the water up for about three miles, and
 "camped.

"Q. In crossing that water, Colonel, did you see
 "any current?

"A. No, sir; I didn't notice any current whatever."
 (Fols. 433 to 435.)

Second Crossing:

"The next day we went to the water, the margin of
 "the water, to a point opposite Dover's, and there we
 "drove across on dry land, and went on.

"Q. Then following the margin of the water, you
 "were still going southward, were you?

"A. Still going southward, yes, sir.

"Q. You say you drove across on dry land. What
 "do you mean? That you drove across this body of
 "swamp land?

"A. Yes, sir; we drove through the tules *where there*
was no water at all.

"Q. Did you not see any water at all?

"A. No water at all, unless stagnant water in the
 "lakes, or something of that kind.

"Q. Did you see any channel through there on this drive?

"A. No, sir; a mass of tules spreading right straight through the whole swamp from one side to the other, with the exception of occasional alkali spots, or these lakes.

"Q. What was the general appearance of that country that you drove through on this last crossing that you mentioned?

"A. It is a perfect mass of tules, sir. It was uniform in that respect. You could see nothing but tules in any direction that you looked. * * We came out and struck the canal, ordinarily known as Wible's canal, about half a mile north of Dover's.

"Q. In the last trip across that you mentioned, did you go completely from the east side of the body of swamp land to the west side?

"A. Yes, sir; entirely across from the canal to the high land on the east side" (fols. 436 to 439).

"We then drove the buggy across the slough at a different course—a course north of the course that we had gone from the east to the west side.

"Q. How far north of that preceding course?

"A. In places I think it was as much as half a mile.

"Q. What was the appearance of the country on that course across? Did you cross completely over to the eastern side?

"A. Completely over to the eastern side. The appearance of that body of land through there was very much the same. I saw no different condition—just one mass of tules, broken only by those little islands and an occasional lake. I saw no channel through there." (Fols. 440-1).

"Q. You spoke of seeing occasional lakes or lake beds. Did you go around those lakes?

"A. Sometimes we drove right through them.

"Q. Could you see whether there was any connection, any connecting channel from one to the other?

"A. Yes, sir.

"Q. Was there?

"A. There was none whatever. It was better driving through the bed of the lake and I drove right through the lake several times.

"Q. Do you mean that you found better driving in those where the water was?

"A. No, sir; there was no water on this last trip. I am referring to the last trip now. We did see one lake that had water in it and I drove through it for the purpose of watering the horses, not because there was better driving.

"Q. Did you see the ends of that lake?

"A. Yes, sir.

"Q. Was there any channel leading into it?

"A. None whatever, sir.

"Q. Any leading out of it?

"A. None.

"Q. In no direction at all?

"A. In no direction whatever." (Fols. 442 to 444).

D. G. McLEAN (for defendant):

"Q. Have you been on that body of swamp and overflowed land south of Tulare Lake and north of what is called Wible's Head-quarters?

"A. Yes, sir; I was on that body of swamp land on the 15th, 16th and 17th of May, 1881. * * * We went to the Round Corral. * * * We started out from there on the morning of the 15th, and went about a mile or two miles north of the Round Corral, and attempted to cross into the slough, but we found water; we were very heavily loaded; we could not go any distance, and we had to return back to camp, and remained there until the morning of the 16th, Monday morning." (T. IV, fols. 1513-14).

First Crossing:

"On the morning of the 16th we came back south about a mile, I should judge, along the margin of the lake, and we went into the tules and found water, and had to turn out on the margin again. After going about a mile south from this Round Corral we

“found water, and we got out and waded across the
 “slough, clear across, going as near west as I could;
 “I mean *by slough* the water, the margin of the tules,
 “*the swamp*. Think we waded between three and four
 “miles, *nearly four miles, across there; I was on foot.*
 “*I found the water from the high land to the high land,*
 “*with the exception of a few high salt grass knolls; we*
 “passed over several spots of high ground. I mean,
 “we found water, with the exception of these islands,
 “from the high land on the east margin of the swamp
 “to the high ground on the west margin of the swamp;
 “I went completely across this body of swamp land.
 “I don't think the water would average to exceed 6 or
 “8 inches in going across there. *The deepest water was just*
 “*to my knees.* It was the deepest water there that I
 “traveled through; perhaps two feet two inches. The
 “widest knoll that we passed over, I think, was 250
 “yards.

“Q. *Did you see any channel at all in going through*
 “*there?*

A. *I saw nothing of the sort; no appearance o' a*
 “channel; NOTHING THAT I BELIEVE THE MOST PREJUDICED
 “OR SKEPTICAL COULD CONSTRUE AS A CHANNEL. *Had there*
 “*been a channel I certainly should have seen it.* It was
 “tules all through there; tules all through. The
 “greatest portion of it we had to part them out to
 “pass through. We traveled out some distance on
 “the west side, on the high ground.” (Fols. 1514 to
 1517.)

“After getting out there we turned back to where
 “the other parties were. * * I then insisted on
 “the others going back to look at the ground I had
 “been over. I returned with them and guided them
 “through. We went back in a buggy. We went
 “back over the same course, but only a portion of
 “the way on the same route. In returning this time
 “*we saw no channels or slough. We saw none.* We went
 “across in a buggy. After reaching the west side with
 “our buggies we returned back again to the same
 “place we had left on the east side.” (Fols. 1517 to
 1519.)

Second Crossing:

"The next day we followed up the margin of the
 "slough opposite the place where there is a house on
 "the west bank; that was pointed out as Dover's place.
 "Then we crossed the slough again; crossed the
 "swamp-land.

"Q. *In using the word 'slough,' are you using it in
 "the same sense that you did before?*

"A. *As I did before—as the swamp, and that entire
 "body of land right through. When we reached a point
 "opposite Dover's, we were still on the high ground
 "on the east side. We crossed no water, that I re-
 "member of, before we got to the point opposite
 "Dover's" (fols. 1519–20). "We then crossed the
 "body of swamp-land at the point from the east side
 "to the west. We went completely across the body of
 "swamp-land to the canal on the west side. In going
 "through we saw a flat body of tule-land. No water.
 "Crossed no water there.*

"Q. Did you see any slough or channel in going
 "across there?

"A. No, sir; nothing that we would recognize as a
 "channel or slough.

"Q. *Well, was there any channel or slough in going
 "through there*

"A. *There was not that I could see. If there had been
 "I should have seen it. It was a body of tule land; tules
 "growing all through there. After getting across we
 "went up to the bank of the canal" (fols. 1520–1).*

"After going to the bank of the canal we returned
 "back to the east side again. We followed up the
 "bank of the canal northward a distance, and then
 "went back to the east side again. In returning to
 "the east side we started in a short distance north of
 "where we came out; didn't return on our former
 "track. *The country through there was very similar to
 "what we had passed in coming. No slough or channel;
 "no water whatever; tules growing the same way" (fol.
 1522).*

GEO. F. THORNTON (for defendant):

Direct-examination, T. IV, fols. 588 to 602.

Cross-examination, T. IV, fols. 608 to 614.

H. A. READING (for defendant):

Direct-examination, T. IV, fols. 625 to 647.

Cross-examination, T. IV, fols. 657 to 690.

Re-direct-examination, T. IV, fols. 690 to 700.

On his direct-examination after having described his trip through the swamp, Reading is asked:

"Q. Mr. Reading, through that portion of this "overflowed land through which you went, was there "or was there not a continuous channel?

"A. No, sir; there was not" (fols. 644 and 647).

PROFILE OF SWAMP, THROUGH SECS. 10, 9, 8 AND 7,
T. 29 S., R. 23 E.

W. R. Macmurdo and T. R. Fillebrown, Civil Engineers, assisted by L. L. Dixon and C. G. Jackson, ran a line of levels across the swamp, from its eastern to its western margin, through the center of Sections 10, 9, 8 and 7, T. 29 S., R. 23 E. The result is shown upon "Exhibit P."

But before making Exhibit P, Macmurdo had made Exhibits "L," "M" and "N." Exhibit M was made on a scale too small to be of much use, and Exhibits L and N each contained some trifling errors. To correct all errors, however trivial, Exhibit P was made. Macmurdo is asked by the Court:

"Q. Is this one you have in your hands (Exhibit P), "an exact profile in accordance with these notes taken "by you and Fillebrown?

"A. Yes, sir; in every particular." (T. IV, fol. 1377).

We call attention to this profile P, as showing the topography of a portion of the swamp through which plaintiffs have represented on their "Map 2" three distinct channels.

In describing the scale of Profile L, which is the same as that of Profile P, Fillebrown says:

“That profile is made on the usual scale adopted in drawing railroad profiles. The difference between the vertical, the light vertical lines, represents 100 feet; the heavy vertical lines 1000 feet; each of the horizontal lines represents one foot in elevation, that is, the smaller lines, and five feet between the heavy lines. The proportion of the vertical to the horizontal scale is nearly twenty to one. If made on a scale of one to one, the fluctuation on the line would hardly be perceptible to the naked eye. That is the reason for making a profile paper that way, to show more prominently slight elevations or depressions in the ground. To represent this profile correctly, it would require a length of nearly twenty times as long as this. That is, the same space which represents five feet in vertical height, represents about 100 feet in horizontal distance. These same undulations in the ground, represented on an exact scale equal to the horizontal scale, each fluctuation or undulation here would only be one-twentieth of what it now is as it stands on the paper. The difference in elevation between any high point and low point, as represented here, would only be the twentieth part of what is represented. This is the scale I think universally adopted in making railroad profiles.” (T. IV, fols. 258-9.)

“The reason that this profile going west seems to indicate a falling of the country generally to the west is easily explained. That line through there on which these levels were taken does not run at right angles with the direction of the valley. It ran diagonally down the valley not at right angles to the general course of the valley. I mean by the valley the general body of swamp land—the entire body of swamp land” (fol. 283.)

In this Profile P, your Honors will notice that at about the middle of the profile—Station 124, there is

a depression shown. This depression represents a pond; an isolated pond; the only one found on that line through the swamp.

T. R. FILLEBROWN (for defendant):

"In running these levels, we went from the extreme eastern side of the body of swamp-land to the extreme west side.

"Q. In going through there, did you find any channel at all?

"A. No, sir; except a stagnant pond.

"Q. Was that a channel—that stagnant pond?

"A. No, sir; I should think not; *it had no inlet or outlet.*

"Q. No inlet or outlet? You went around it?

"A. I did." (T. IV, fol. 256). "We ran levels around the south end of it. They were just about the same; showed the same character of profile as the balance of the ground" (fol. 277). "We went completely around the southern extremity of the pond. No inlet at all. It was entirely grown up with tules; very dense" (fol. 281).

"Q. Now, in giving the different stations that you have given, 100 feet apart, how was the land from one station to another? Suppose you came to a place between the intermediate stations that was deeper than the outside, would you make a note that you noticed any such place in the intermediate spaces?

"A. I crossed two little depressions that happened to come right between the stations, perhaps a foot below the general lay of the ground, but they were not over one or two hundred feet in length. I could see either end of them; *just little gullies. They were not continuous depressions at all. They ran out in 200 or 300 feet.* They were perfectly dry. We walked right across them, and could see to either end of them. *They formed no channel at all; simply little holes in the ground.*" (Fols. 281-2.)

On cross-examination:

"Q. I understand you to say that you fixed your levels at every 100 feet?

"A. Yes, sir.

"Q. Have you in your notes anything to show the condition of the country between those points?

"A. I have two explanatory notes there, which I referred to this morning.

"Q. Is that all?

"A. That is all. That is, in addition to the stagnant pond that I ran around, there are two little gullies that I crossed, but they happened to come midway, or between stations; and the rodman did not take the elevation of the bottom of these places; but I noted them as I walked over them, examined the ground both north and south, to see that they were not of any consequence. They were little depressions, perhaps a foot deep; little holes or gullies in the ground, and I followed them far enough both north and south to see that they ran out entirely in the course of 200 or 300 feet. The profile only shows the direct line from one point to the other point, being 100 feet apart.

"Q. It don't pretend to follow the ground between the points?

"A. It is always understood, however, that if there was any material undulations in the ground between stations that they are to be noted; and we always do so. Only material changes are noted. A material change I should consider any that would have any effect in constructing earthworks if we were doing anything of that kind, or anything that would make any sort of a showing as to the lay of the country.

"Q. If you were running that line for the purpose of building a railroad or earthwork, would you in your notes show everything that existed there where there was any change between the 100-foot points?

"A. I would not note anything that I saw on that line, unless it was the pond I speak of that I gave you the notes of.

"Q. That you omitted to note?

"A. I omitted to note the exact depth of that, because it was disagreeable to get into the water there to take the bottom. I saw by running around it that I could keep the same elevation.

"Q. Well, the very purpose for which you went there was to find out whether there was any water there or not?

"A. *The purpose for which I went there was to find out whether there was a continuous channel, and I satisfied myself better by going around the end of it than there was not, than was possible by going through it. However deep it may have been, it would not prove that it was a continuous channel if it ended in 300 or 400 feet*" (fols. 327 to 331.)

W. R. MACMURDO (for defendant):

"We ran a line of levels through the center of Sections 10, 9, 8 and 7, T. 29, R. 23, and a part of Section 12, T. 29, R. 22.

"We found a flat country grown over with tules, almost the whole distance; sometimes would come to a clear place where there were grasses growing on the ground, a little higher than the general surface of the swamp. In the center of the swamp we crossed a pond. Then we ran on through the west margin of the swamp. We found nothing but tules and a level country straight through. When we got near the levee of the Kern Valley Water Company, the land was a little more uneven, and there were some salt grass hills or knolls. In making that survey, we took an assumed elevation on the east margin of the swamp, and ran through until we reached this pond; then ran around the bank of this pond until we got opposite to where we had started to make the turn. *We went around the south end of the pond; and from the western side of the pond we went due west again, on the same line we had been running on.* * * We went through to the western side of the swamp." (T. IV, fols. 1099 to 1101.)

"Q. After reaching that pond, what did you do?

"A. We took the levels then right around the bank of the pond, following southward until we reached the south extremity of the pond; then we followed along the bank until we got back opposite a point that we had left on the line, on the east and west course. Going around the pond, the country was an unbroken tule growth.

"Q. Any depression around the end of this pond?

"A. No, sir.

"Q. Any channels?

"A. There were no channels. We went around the south end." (Fols. 1109-10).

The levels around the south end of the pond are shown by the small profile line on Exhibit P.

Macmurdo afterwards went back and examined the north end of the pond. He is asked:

"Q. And how did you find that?

"A. We found water down in the slough for a short distance, and then the bottom of this pond commenced to rise up until it got up on a level with the outside country.

"Q. Did you take any level at the north end of the pond?

"A. Yes, sir; I took a level in the lowest ground I could find there in this line of this pond; and the top of that ground, or what would be called the bottom of the pond—if there was any there that far—was two feet higher than the water extended in this pond, and was about the same elevation as the surrounding country." (Fols. 1135-6).

"Q. What was your object in making that cross-section?

"A. My object was to find out whether there was any continuous channel through that body of swamp land or not.

"Q. Can you explain whether or not a surveyor, in

"making a cross section through there, would go around
 "any such thing as this pond?"

"A. I don't think he could do anything else. There
 "would be nothing else for him to do, if that was his
 "object, as it was ours. We continued through until
 "we met with the pond, and, to find out whether it was
 "a pond or slough, or whether it was a lake, or what it
 "was, we went around the bank of it, and found out
 "the elevation of these banks in regard to the line that
 "we were running; continued around on the ground to
 "see whether there was any inlet or outlet to it. Had
 "we not gone around, it would not have shown us the
 "true state of the case; it would not have been a true
 "profile of the country.

"Q. Could you, by simply going straight through
 "there, without deviating at all from your course, have
 "found out what you went there to seek, or not?"

"A. No, sir; it would not show as a pond, which is
 "the true state of the case. It would not have been a
 "true profile of the country if I had gone straight
 "through. It would not have shown what it was our
 "purpose to show. Had there been any channel along
 "that course, I should have seen it.

"Q. Any continuous channel?"

"A. Certainly; my object in going around that
 "pond was to see what it was. That pond was not a
 "part of any continuous channel.

"Q. Could a surveyor ascertain whether there was
 "a continuous channel there or not without going around
 "that pond, and things that you met?"

"A. No, sir; unless it should happen that he struck
 "it, and got through it in a straight line, where there
 "would be no pond, which he might do." (Fols. 1378
 to 1381.)

Both Macmurdo and Fillebrown state positively that
 in running these levels through Sections 10, 9, 8 and
 7, they found no channel or slough whatever; that
 there was none; that this pond they speak of had
 neither inlet nor outlet, and was not a part of any

channel. L. L. Dixon and C. G. Jackson assisted in the running of these levels, and likewise state that there was neither inlet nor outlet to the pond; also that there was no slough or channel whatsoever in the swamp on the line of that crossing.

Doubtless, were it not that we have so conclusively shown that it is isolated and entirely disconnected from any other channel, plaintiffs would have claimed this pond, found by Macmurdo and Fillebrown on their line of levels, as one of their water-courses or continuous channels, but, as seems the case with most of their pretended channels, water will only flow into it after it has passed beyond and spread indefinitely over the swamp.

L. L. DIXON, having first stated that on or about April 28th or 29th, he was with Fillebrown and Macmurdo at the time they ran their line of levels through Sections 10, 9, 8 and 7, T. 29, R. 23, (T. IV, fols. 702 to 705), says that he went back again to this same line on the 11th day of May. Says he: "Went down on to the first cross-section we ran down across to Dover's, and went down to that pond that I spoke of." (Fol. 711).

"Q. Before getting to that pond, or in getting there, did you see any water?

"A. Yes, sir; we started to go right through on the same line that we had run, but could not do it on account of the water; we struck water very soon after we left that little cabin.

"Q. How was that water?

"A. *Spreading out over the country.*

"Q. *Did you go around that?*

"A. Yes, sir.

"Q. *Did you go through it?*

"A. No, sir; we drove into the edge of it and bogged the horses, and turned and went north, and then went east until we got on that high ridge there.
 " * * Then we kept pretty well to the north of the water until we got around it; we were right on the edge of

"it and could see it spreading all around in every direction;
 "then we went around and came in on the cross-section,
 "between this water and the pond that I spoke of.

"Q. In going around that water, going along to the
 "cross-section to about where the pond was, did you cross
 "any water?

"A. No, sir.

"Q. You continued around this; did this water extend
 "north of where you struck it at the point where the pond
 "was?

"A. Yes, sir." (Fols 711 to 714).

"Q. You went off your line and went north?

"A. Went off about three-quarters of a mile and then
 "turned almost due south and got back on the line.

"Q. When you got back to the point where your
 "line crossed the pond, did you see any water to the
 "east of you?

"A. Yes, sir.

"Q. How far was the water to the east of you from
 "this point?

"A. It was but a short distance; I don't think it
 "was over half a mile, or three-quarters.

"Q. Then when you got back to the pond, did you
 "go around it?

"A. Went all around it, yes, sir.

"Q. On the north side of the pond too?

"A. Yes, sir; drove entirely around it.

"Q. Was there any outlet or inlet to that pond?

"A. No, sir." (Fols. 715-16).

"Q. Was this water that was in the pond connected
 "with this water that you ran around?

"A. No, sir.

"Q. No connection?

"A. No connection whatever." (Fol. 717).

W. R. MACMURDO, having described his levels or
 cross-sections through the swamp, is asked:

"Q. Did you ever go back there again to either of
 "those places where you made those cross-sections?

"A. Yes, sir; I went back to one, to the first one.

"we made, running through sections 10, 9, 8, 7 and 12.
 "I think it was on the 11th of April" (evidently a mistake in the transcript for "11th of May," for the line of levels was not run prior to the 25th or 26th of April. *vide* T. IV, fol. 1098). "My object was to get a more
 "accurate cross-section of this pond that we crossed.
 "I went from Bellevue Ranch * * and came into
 "the margin of the swamp near DeWeber's on Section
 "20, T. 29 S., R. 24 E. My object was to go to Har-
 "rold's Camp, where we went in before. From De-
 "Weber's I followed along the eastern margin of this
 "swamp land northward until we got to Harrold's
 "Camp. We went into the swamp and took the same
 "course that we started from, going in a due west
 "course; went about two or three hundred yards on
 "that course and we came to water *spread out among*
 "*the tules*; and we were afraid to venture in with the
 "animals and went around, followed around the edge
 "of the water, going north-westerly. We had gone
 "but a short distance when we struck the water
 "again ahead of us. Then we had to go more to
 "the eastward again, until we got to the edge of the
 "water. We went then in a northerly direction and got
 "around and started to go to the west, and continued
 "along west until we got to Broder Island. We kept in on
 "the high land then in a westerly direction until we got
 "probably a mile and a half from the eastern margin
 "of the swamp. Then we went back in a southwesterly
 "direction until we got on the line again that ran through
 "Sections 10, 9, 8 and 7. *We went completely around this*
 "*water. It was spread out very nearly from the eastern*
 "*margin, I should think about three hundred yards. I*
 "*should say* IT WAS A MILE AND A QUARTER WIDE. *We*
 "*went completaly around the water; when we struck that*
 "*line again we were on the east side of the pond, and we*
 "*reached there without crossing any water at all.* We then
 "went down to the edge of the pond and followed the
 "line down and set up our instruments and measured
 "the width of the water, and took the level of the sur-
 "face of the water and the depth of this pond in sev-

“eral places, going across in a direct west line. The
 “depth of the water was just about one foot. After
 “making the cross-section of the pond, I drove around
 “the pond, commencing at the point where we crossed
 “it, and drove around the south end of it, going around
 “the same end that we had gone in the first instance.
 “*We found it in the same state as it was when we were there*
 “*before.* I then went around toward the north end,
 “went around the pond on the north end; I went
 “completely around the north end.

“Q. And how did you find that?

“A. We found water down in the slough for *a short*
 “*distance, and then* the bottom of this pond commenced
 “to rise up until it got up on a level with the outside
 “country.

“Q. Did you take any level at the north end of the
 “pond?

“A. Yes, sir; I took a level in the lowest ground I
 “could find there in the line of this pond; and the top
 “of that ground * * was two feet higher than the
 “water extended in this pond, and was about the same
 “elevation as the surrounding country.” (T. IV, fols.
 1131 to 1136.)

“I went westward a short distance from the pond,
 “probably a half a mile, and we found it in the same
 “condition that it was when we left there before; saw
 “no water. The most extreme northern end of the
 “water that we went around was farther north than
 “where we struck the pond. The line running directly
 “east and west from the pond was through the water;
 “a line running at right-angles with the body of the
 “swamp-land would come close to the water—where
 “the water was at that time; the water was nearly as
 “far as Broder’s Island, right at the edge of it, at
 “that time; the southern end of the pond was a quar-
 “ter of a mile south of where we crossed it.” (Fols.
 1142-3).

We see, then, that though no water has yet gotten
 into this pond, the water has already spread to the east
 and northward beyond it, a mile and a quarter wide.

In fact, instead of following any defined channel or line of depression through the swamp, the preference of the water seems to be to first spread and squander itself over the surface of the country and then fill up or back into any low places, sloughs or hollows it may find.

We notice that, on pages 68 and 365 of their Points and Authorities, appellants attempt certain deductions from a seeming discrepancy between the testimony of Macmurdo and that of Fillebrown relative to this pond. They say that Macmurdo fixes it at Station 124, or 12,400 feet from the starting point, whilst Fillebrown places it at Station 114, or 11,400 feet from the starting point, making a difference between them of 1,000 feet. We think, however, that the discrepancy is merely seeming, not real, and that your Honors will readily understand how it occurred.

When first examined relative to this line of levels through the swamp, Fillebrown was asked:

“Q. Where did you strike this pond?”

“A. It was at the 115 Station; * * the west bank “is on 115. Station 114 was the east bank.” (T. IV, fols. 274-5.) But he unquestionably meant Stations 125 and 124. Both counsel and witness (neither having seen the mistake made) continued to refer to Stations 124 and 125 as stations 114 and 115. That this is true is manifest, for—

FIRST: On pages 67 and 68 of the Transcript, Vol. IV, there is set out in full the elevations at the different stations as Fillebrown read them from his notes. If your Honors will but take the trouble to count these stations, you will find that station 113 is at the beginning of the thirteenth line from the top of page 68, and immediately opposite to folio 269. We then have the following stations and elevations:

St. 113; El. 93.9.	St. 114; El. 93.8.	St. 115; El. 94.2
St. 116; El. 94.4.	St. 117; El. 94.3.	St. 118; El. 94.3
St. 119; El. 94.3.	St. 120; El. 93.8.	St. 121; El. 93.9
St. 122; El. 93.3.	St. 123; El. 92.7.	St. 124; El. 91.9

Then comes the detour around the pond (*vide* fols. 278-9) as follows:

St. 1; El. 92.9.	St. 2; El. 92.9.	St. 3; El. 93.3
St. 4; El. 92.9.	St. 5; El. 92.9.	St. 6; El. 92.5
St. 7; El. 93.7.	St. 8; El. 93.0.	St. 9; El. 92.9
St. 10; El. 92.9.	St. 11; El. 92.3.	St. 12; El. 92.5
St. 13; El. 92.3.	St. 14; El. 92.8.	St. 15; El. 92.4
St. 16; El. 92.4.	St. 17; El. 92.2.	St. 18; El. 92.8
St. 19; El. 92.9.	St. 20; El. 93.1.	St. 21; El. 92.8
St. 22; El. 93.0.	St. 23; El. 92.5.	St. 24; El. 93.2
St. 25; El. 92.4.	St. 26; El. 93.2.	St. 27; El. 93.9

And at Station 28, which is back on the original line again, and corresponds with Station 125, or 115 as the case may be, the elevation is 94.3. Then having got back to the original line, we have—

St. 125; El. 94.3.	St. 126; El. 93.9.	St. 127; El. 93.6
St. 128; El. 93.7.	St. 129; El. 94.2.	St. 130; El. 93.9

etc., etc.

Now on page 71, folio 280, Fillebrown is asked:

“Q. What was the elevation of Station 114?”

“A. 91.9, sir.”

His answer shows that he was referring to Station 124, for, according to his notes, the elevation of Station 124 is 91.9, whilst that of Station 114 is 93.8.

Again, page 70, folio 273, Fillebrown says: “Station 114 was at the east bank of the pond. Then going south, it reads:

“ 92.9	92.9	93.3	92.9	92.9	92.5
“ 93.7	93.0	92.9	92.9	92.3	92.5
*	*	*	*	*	*

“Station 115 being then on the west bank of the pond
“on the original line, back to the original line. * *

“Q. What was the elevation of Station 115?”

“A. 94.3.”

But, according to his notes, Station 115 is 94.2, whilst Station 125 (after having made the detour of the

pond and got back to the original line), is 94.3. Moreover, the detour of the pond itself is given as 92.9, 92.9, 93.3, 92.9, etc., etc. (*vide* fols. 278-9), and commences immediately after Station 114, according to Fillebrown's mistake, but after Station 124 as a matter of fact. By referring to the notes, your Honors will see that immediately following Station 114 the elevations are 94.2, 94.4, 94.3, 94.3, etc., etc., entirely different from those around the pond; whilst immediately after Station 124 the elevations are 92.9, 92.9, 93.3, 92.9, etc.—the identical ones read by Fillebrown for the detour of the pond. (Fols. 278-9.)

Again: Folio 281, Fillebrown says that the elevation of Station 113 is 92.7. But his notes give the elevation of Station 113 as 93.9, and that of 123 as 92.7.

It is evident then, that though both witness and counsel designated the pond as at Stations 114 and 115, they meant, as the notes themselves show, 124 and 125.

SECOND: Fillebrown, coming back to the stand at a later period (*vide* T. IV, pages 364 to 367), and reading from these same notes says: "At Station 124, on east bank, a long stagnant slough about 4 feet deep, water 1.0, then on the next line I commenced a detour around the pond or slough, and note points running south around the end of the slough." (Fols. 1458-9.) Thus showing that his former reading was a mere mistake, and not an intentional fixing of the pond at Station 114.

THIRD: Macmurdo's readings of the several stations and elevations, and the location and detour of the pond were from Fillebrown's notes. (*Vide* T. IV, fols. 1280-1.) It was therefore impossible for him to fix the pond at any station but what was shown on those notes, to-wit: Station 124.

We dislike exceedingly to waste your Honors' time, as well as our own, in explaining away such self-evident mistakes, but as plaintiffs seem inclined to so

greatly magnify such little things, we feel constrained, in this instance at least, to point out to your Honors how the argument they have built thereon, has no real foundation in fact.

Without further comment, we refer your Honors to the testimony of these witnesses relative to the line of levels, and the character of the country through which it run:

MACMURDO: Transcript IV.

Direct-examination, fols. 1099 to 1114, 1131 to 1143, 1170 to 1173.

Cross-examination, fols. 1280 to 1315, 1333 to 1352, 1391 to 1392, 1399 to 1403.

Re-direct-examination, fols. 1367 to 1381, 1406 to 1416.

FILLEBROWN: Transcript IV.

Direct-examination, fols. 255 to 283.

Cross-examination, fols. 325 to 343.

Recalled, fols. 1453 to 1465.

DIXON: Transcript IV.

Direct-examination, fols. 702 to 706, 711 to 718.

Cross-examination, fols. 737 to 762, 769 to 771.

Re-direct-examination, fols. 783 to 787.

Re-cross-examination, fols. 787 to 792.

JACKSON: Transcript IV.

Direct-examination, fols. 517 to 521.

Cross-examination, fols. 568 to 582, 586.

We have shown, conclusively we think, that there is no defined channel northward of the centre line through sections 10, 9, 8 and 7, T. 29, R. 23.

If your Honors will now look at Maps B and D—bearing in mind always the fact that said maps were made from actual survey, and to show the country as it then existed—you will be satisfied that there is no channel between this tier of sections and the point in Sec. 24, T. 29, R. 23, where

the traceable channel, mentioned in Finding 71, terminates. Through Sections 9, 16, 15, 23 and 22 you will notice there are tracings of a slough shown on these maps, and on Map D, marked "*Detached and shallow slough*"; but they are entirely disconnected from any other channel, and evidently do not form part of a water-course. If you will but take the trouble to compare this "*Detached and Shallow Slough*" on Map D, with the channels shown by McCray on Map 2, you will not only be struck with the inventive genius of Mr. McCray, but will, we think, forthwith reject Map 2 as a fabrication, false and unreliable.

Now as to the traceable channel mentioned in Finding 71:

Maps D and B each show that this channel terminates in Section 24, T. 29, R. 23. McCray stopped meandering there, and though he does not directly state that there was no channel beyond that point, he indirectly shows such to be the fact.

"Q. What was the object of meandering those streams at that time, in 1877 and 1878?"

"A. I received instructions to do so, * * just instructions to do so. These things are not always explained to the surveyor. I took notes of the meander of the *whole stream*." (T. II. 805-6.)

"Q. Map D does not show a continuous slough in there through those swamp lands. * * Why is it the slough stops at Section 24? After that is there not a continuation of the slough? Why does that appear in that manner on that map?"

"A. That is as far as I meandered it.

"Q. Was that as far as you ran with a view of locating the slough at that time?"

"A. I made a survey of it.

"Q. Did you pretend at that time to locate the slough beyond 24?"

"A. No, sir" (fols. 1645-6). Of course not; he had meandered *the whole* of it.

Macmurdo says there was no slough to locate beyond

that point. "I have meandered that slough," says he, "as far as there is any slough to be found—as far as the end; * * it ends on Section 24, T. 29, R. 23." (T. IV, fol. 1062.)

On the oral argument of this case Mr. McAllister, of counsel for appellants, made much comment upon the fact that the diagrams, which we had presented in our Points and Authorities, represented three breaks in this traceable channel, one on Section 14, one on Section 15, and one on Section 4, all in T. 30, R. 24; and he devoted a very considerable portion of the time allotted him, to arguing against the third or northernmost break.

We are entirely satisfied that these breaks do exist, and that the evidence amply supports the facts shown on our diagrams—diagrams which we have again inserted in this Brief.

Again referring your Honors to Map D, you will notice that McCray has marked that portion of the slough through Section 4, T. 30, R. 24, as being "*not well defined*," and has also made two breaks in the slough, one on Section 15 and the other on Section 14, same ~~to~~ township and range.

With this map before you we now call your attention the testimony of

WM. SOUTHER (for defendant):

"Q. Do you know generally that body of swamp land between Wible's Headquarters and Tulare Lake; do you know that body of swamp land?"

"A. I do. I attempted to farm down there." (T. III, fol. 668).

"Q. Did you ever see that map before, Mr. Souther?" (Map D shown the witness.)

"A. I saw this map, or one just like it. I could not swear that is the map. We had one down there. Mr. Livermore used to carry a map just like that. He and I would go up and down with the map. It was made by Mr. McCray. I take this to be either that

"map or a copy of it. I used a copy of that map in connection with my work down there; one just like it, at least. * * Wible had one, Livermore had one, and I had one.

"Q. Can you now designate on that map what portion of those lands you cultivated or sowed?

"A. It was in the south half; you may say, a portion of the south half of Section 2; Sections 11 and 2. * * I sowed grain on that portion of Section 11, east of the canal. * * Then I went down on Sections 3 and 33; ran through all these sections and examined the lines and corners as marked by Mr. McCray." (Fols. 649 to 672).

"My camp was on Buena Vista Slough, at the end of the cut which is marked Central Cut.

"Q. What was the cut? Is that cut there in your land?

"A. *The design of that cut was to convey the waters across the flat.* IN THE SLOUGH THERE WAS A BREAK—A PLACE WIDE AND FLAT. THERE WAS NO SLOUGH TO AMOUNT TO ANYTHING." (Fols 672-3).

"Q. *Could the water run through the slough at that point?*

"A. *Well, it spread.* THE WATER WHEN IT GOT TO THIS POINT, THE WATER SPREADS ALL OVER THE COUNTRY.

"Q. What point is that?

"A. This upper point of this cut marked 'Central Cut,' that terminated on the line between Sections 3 and 4, and ran down on the northeast corner of Section 5. When the water flowed down this slough here—this crooked slough here, as you see marked on the map—and got to that point, that is, the southeast point of the Central Cut, as marked on Map D, it spread to the south." (Fols. 673-4).

"I plowed some in Sections 33 and 32, in T. 29, R. 24. I put in some corn and pumpkins there on those sections. * * I have left there. *The water drove me out.*" (Fols. 675-6.)

"Q. You say the water drove you out. Didn't you raise a crop there?

"A. No, sir; the water flooded the crop. Before I left it, or about the time I left it, *the water was coming over the land*, over the corn, etc., that I had planted.

"Q. Was the water that was coming over there, flowing in any channel at all?

"A. Well *it came in on me* FROM THE EAST. The water apparently had been turned out here. When I commenced my roadway, the water was flowing all through this country here." (Referring to Map D). "It spread over that portion of the country. When I threw in my levee here there was a low place up here, a low place in the ground. I didn't get the levee high enough, and the water ran over it. That came behind here and all through that entire country. So much so, that it drove me out. I had to leave; to go out to dry land. THE SLOUGH WAS FILLING UP.

"Q. *What do you mean by* THE SLOUGH, Mr. Souther?

"A. *I mean that tract of swamp and overflowed land.*

"Q. You are not, in the use of that word, referring to any particular channel, are you?

"A. No; *there was no particular channel, or rather, the water came down the channel UNTIL IT REACHED A POINT JUST BELOW THE HEAD-GATE, perhaps about half a mile. There are some depressions there. We termed them sloughs that ran from the canal on the east side back to the east line of the canal*" (? East Side Canal) "*here. Those were what we termed the slough. It was a depression in the land that ran back there. The water, when it got back there, flowed out into this channel. That bank is lower than it was here—back in the main described channel here. It went off here, instead of following that down, and that is the water that troubled me. When the water was turned through that head-gate, a few rods above the camp, into this slough—into Buena Vista Slough—it ran down in here somewhere. I never was there*" (that is, to the place where

it ran down to), "from the fact that there was so much water there. I could not get by it. *I went down to the west side, to the west bank*" (that is, opposite to where it ran out on the east). "*It was not all the way down. But the bank was low there and it threw it out here.* The water came in here to the bank of the canal. I" (It) "threw the water right up against the east bank of the canal. *It flowed down in here THROUGH THAT BREAK IN THE SLOUGH THERE WHERE McCRAY LEFT THE BREAK IN THE SLOUGH; the depression there was low to the east. That is in Section 15, in Township 30, Range 24.* The water that came up here to the east, flowed back in this depression until it struck the east line of canal" (evidently meaning the East Side Canal), "in Section 11. Then it flowed down all over that country there, from there clear to the slough. There was so much water that I tried several times to get through there, and usually failed to get through. Once or twice I made it through there. The whole country was inundated there; all through that portion there down to 3, and into Section 3" (fols. 676 to 681). "The water came out and overflowed the country between what is marked as the slough on this map and the east line of canal" (? East Side Canal). "It spread out pretty much all over the country; so much so that it drove me out of Sec. 33, where I was doing the work. * * On Section 4, and 32 and 33 was my first work inside of what we termed the slough lands. It drove me out of there, and spread over that whole place." (Fols. 683-4).

"I did not succeed in my farming down there. The water finally got all over the country so that I could not easily get in, and I became a little disgusted with the country down there and left it. That was in 1878. I think I left there in May. There was plenty of water down there then. At that time Bonestell was living down there." (The Bonestell place was on Sec. 24, T. 29, R. 23.)

"Q. Did he have any water down there?

"A. Well, he had some water. There was a little water in the slough. A little had run down in the slough at the first rise. It was either in January or February. I disremember the exact time that the water come down. It was about that time, though. I was there off and on all through February, and sometimes in January. It was about that time. *At the time I was being flooded out at my place, the water had not reached Bonestell yet.* One cause of the flooding was that Bonestell went up to Wible—I had spoken to Mr. Wible not to turn in any water if he could get around it. Mr. Bonestell came and asked him if he would not turn him in some more water, he was short; his crops were failing. He turned the water on and that increased the water on me, and it spread out.

"Q. The water had spread out over the country before it got down to Bonestell's?

"A. A pretty large proportion of the water ran to the east line of canal" (? East Side canal) "and went down that portion of the slough. When it got to the upper end of this Central Cut, as marked on this map, there it ran then off to the side. It took a large body of water in order to get it down the slough enough so that Bonestell could irrigate with it. *Hence, when they turned it in on Mr. Bonestell to supply him, it flooded me out.*" (Fols. 685 to 688.)

MACMURDO:

As to the break in Section 4, T. 30, R. 24:

"I meandered a part of the slough in May 1879, and a part of it, I think, in 1880." (T. IV, fol. 1062). "The first time I meandered from Headquarter Camp down toward Section 3. I crossed it at section 4, I think it was, T. 30, R. 24. I finished the meandering from Section 4 northward about May, 1880" (fols. 1078-9).

In describing his notes of these meanders he says:

"There is a short gap between the two notes. * *
"From the point where I stopped before, the slough

"being dry, I was not able to make any survey of it,
 "because I could not trace out the banks of the slough.
 "They were so undefined that I left the gap in there,
 "and was unable to finish it. It was overgrown with
 "tules, the most of it. The banks were undefined and
 "it was a very hard matter to make a survey of it and
 "locate the slough through that portion of the
 "swamp. * *

"The Court. In what section is that?

"A. That is in Section 4, T. 30, R. 24." (Fols. 1450-1).

CROCKER says that at about Section 4, T. 30, R. 24, or, as he describes it, about three miles below Wible's, "the channel disappears; goes down until it
 "ceases to have well defined banks to it; it is more of a
 "depression in the ground than a channel cut through
 "the ground." He says that "in places it has banks and
 "in other places no banks of any kind." In fact, Crocker designates this particular place as "*the break in the channel,*" and says that water will there flow to the west before it will continue in what we have denominated the traceable channel; or, as he himself expresses it, "the water will run in this western channel before it
 "will into the middle one" (*vide ante* pages 109 to 113).

Crocker's testimony also proves, like that of Souther, that the water coming down the slough, when it reaches those breaks shown by McCray in Sections 14 and 15, there passes to the east instead of following the channel. He is asked:

"Q. How many channels are there besides this one
 "you speak of, from Wible's down to Weed Island?

"A. I don't know of any *regular* channels. There
 "is places where there is depressions—no *regular*
 "slough. * * On the east side of that slough, from
 "Wible's Camp down, between that and the main
 "land, there are depressions in the ground, like sloughs
 "cut out.

"Q. Wherein does not that, when the water is all

"gone, present just the same characteristics of a water-course as the one you call the main slough?"

"A. *There WHERE THE WATER BREAKS OUT, the water that runs down there generally comes in and STANDS BETWEEN THE LEVEE AND WHAT WE TERM THE HEAD OF WEED ISLAND, ON THE EAST. It stands in that country.*" (T. II, fols. 597 to 600).

The break mentioned by Crocker in this last answer is not the break he had previously referred to as "three miles below Wible's," for, at that break he says the water goes *to the west*, whilst from this break the water passes *to the east*, where "there are depressions in the ground like sloughs cut out." As the water passes to the east, according to Crocker's description, just the same as it does according to Souther's description, the break last referred to by Crocker must be the same as that mentioned by Souther and shown on Map D by McCray.

MACMURDO says: "Through Section 15 the slough is very crooked; gouged out in deep holes on the bottom; has perpendicular banks *in places*; continues on in that way for a mile to the northwest; has well defined banks until it reaches very nearly the north line of Section 15, T. 30, R. 24; *there are ponds on the outside of the channel, and THE WATER OF THE SLOUGH goes up in this pond there and into Section 15 BETWEEN THE CHANNEL AND THE BANK OF THE CANAL. It is hard to tell where the bed of the slough is there.*" (*Vide ante* page 153.)

JAMES, also, shows that the water comes out of these breaks shown by McCray in Sections 14 and 15; else where could the water have come from which, in May, 1871, he saw flowing northward along the eastern margin of the swamp in Sec. 2, T. 30, R. 24? (*Vide ante* pages 146-7.) This flow of water in 1871, described by James, corresponds exactly with the flow in 1878, described by Souther.

FILLEBROWN went along the east side of the slough from near Wible's, May 15th, 1881. Says he:

"I believe Mr. Crocker's house is on Section 15, T. 30, R. 24, very near the north line; on the northwest quarter [points it out on Map D]. In going along the east side, *opposite Crocker's house*, we struck a little overflow from the slough, which was almost stagnant, moving very slowly out from the slough. *It was running in no channel. It was spreading out a good deal on the east side of the slough.* We went on down the banks of the slough as well as we could, and came across a great many of these short bends, and here and there we found water. We went out to the edge of it, and in some places waded through it; we generally waded through it to save a great deal of distance. The first place we came to water below this place opposite Crocker's, was 200 or 300 yards below Crocker's house.

"Q. Was that water that you found in the slough?

"A. No, sir. When I speak of finding water I mean *outside of the slough.* There was water in the slough. *This water was on the outside of the slough; on the east side. It was not in any channel on the east side of the slough.* IT WAS ALL SPREAD OVER THE TULE.

"Q. Where did this water come from that was spreading out over the tules?

"A. It came from the slough overflowing its banks. *We found such places very frequently from there down.* I could not state how many. There were, here and there, *high points* in the banks where they were not overflowed. little islands all along among the tules which were not covered with water, and, *generally speaking, the ground outside of the bank of the slough was covered with water from there down.* I was walking on the bank of the slough on the east side. I never confined myself to the banks of the slough. We cut across these points. In many places we were away back a quarter of a mile perhaps, or more, from the slough, and we would strike these overflows." (T. IV, fols. 243 to 246.)

At the time Fillebrown found the water flowing out of the slough to the east on and about Section 15, there was then but $17\frac{1}{2}$ cubic feet per second flowing into the slough through the waste-gate of the Kern Valley Water Company's Canal, for: On that same day, May 15, 1881, (T. IV, fol. 1143), Macmurdo went across the swamp from the De Weber House westward, struck the canal levee, and followed it up past Wible's headquarters. He is asked:

"Q. Did you see any water going from the canal anywhere along the levee?

"A. No, sir; I saw no water going from the canal along the levee until we got to the waste-gate, where some water was running out the waste-gate; *I saw water running there when I was there on the 20th of April; water was going out of the waste-gate at that time.* I met Mr. Mendell and Mr. Fillebrown at the waste-gate; they were making the measurement of the water and of the bank down there at that point. *I noticed generally the amount of water flowing through there, and looked at the gate and saw the water flowing through, but didn't take any measurements myself; I noticed generally the volume of water going over there; I noticed this water the last time I was down there; I think it was about THE SAME AMOUNT as when I was down there * * on the 20th of April; it looked to be, as near as I could judge, without taking actual measurement. I think ABOUT THE SAME AMOUNT OF WATER.*" (T. IV, fols. 1151 to 1153).

At that time, April 20th, 1881, the amount of water flowing into the slough was, from actual measurement, just $17\frac{1}{2}$ cubic feet per second (T. IV, fol. 252).

Now a ditch twelve and seven-tenths (12.7) feet wide on the bottom, with a grade of one (1) foot per mile, and banks sloping 2 to 1, with water flowing one (1) foot deep, will carry exactly $17\frac{1}{2}$ cubic feet per second.

MURRAY says:

"After you get down to where Wible's Camp is now, *this Buena Vista Slough that comes down about there,*

*"a little below, if I recollect well, spreads out all over the
"country." (T. IV, fol. 1511).*

As to the so-called East and West branches of the slough:

Many of plaintiffs' witnesses testify that the slough branches at the head of Weed Island. Some say that from that point it runs in three channels, but they differ radically as to which of the three could be termed the main channel, or into which the water would flow at a low stage. Others again contradict the "three channel" theory, and, repudiating the channel through the centre of Weed Island, state that from the point of division there are but two channels—one to the east and the other to the west of the island.

McCRA Y (for plaintiffs):

When McCray made his surveys and meanderings in 1877-8, he was unable to discover what plaintiffs now claim as the east and west branches of the slough. His Maps B and D, made at that time with great care and precision, show that such branches do not exist.

SCHUYLER (for defendant):

In 1879, Schuyler crossed the swamp at a point south of the Bonestell place, and in doing so crossed the traceable channel through Weed Island. Not only does he himself testify that that was the only channel he saw at that crossing, but he tells us that on that occasion Wible stated to him that there was no other channel within the swamp. (*Vide ante* pages 150-1).

MACMURDO, having stated the object of his meander to be "to find and to lay down correctly on the "map any channel that there might be through that "body of swamp land," is asked:

"Q. In going from Wible's camp north, did you find "any branches or other channels running out of that "channel?

"A. I found no branches at the time I was mean-

“dering it—found no branches at all. At other times
 “I have seen the water flowing out *all over the banks*;
 “I did not call them branches.” (T. IV, fols, 1077-8.)
 In 1880 he saw no branches (T. IV, fol. 1079). April 7th,
 1881, he struck the swamp a short distance north
 of the northern end of the East Side Canal (*vide* Map
 D); from there he went a little north of west through
 the swamp to the head of Weed Island, about Section
 32; saw no channel east of the slough (fols. 1092 to 1094).
 The next day he went west through the swamp land to
 the Bonestell House; crossed the channel through
 Weed Island which he had previously mean-
 dered. That was the only channel he saw. From
 there he continued in a westerly direction through the
 swamp land to the levee on the west margin of the
 swamp; found no channel in going from Bonnestell's.
 (Fols. 1095-6).

FILLEBROWN, says that from Wible's to the Wil-
 lows, which he locates on the southeast quarter of
 Section 32, T. 29, R. 24, (*vide* T. IV, fol. 247), there
 was no water-channel or slough east of or running from
 that marked “Buena Vista Slough” on Map D. (T. IV,
 fols. 252 to 254).

April 28, 1881, Macmurdo and Fillebrown, starting
 from the southeast corner of section 28, T. 29 S., R.
 24 E., and taking a course south 16 degrees west, ran a
 second line of levels across the swamp. Macmurdo says:

“On the line from the southeast corner of Section 28,
 “we ran through Section 33, into some portion of Sec-
 “tion 4, T. 30, R. 24. We found water spread out over
 “the ground so that the animals could not go any fur-
 “ther; they bogged down. We sent the wagon back,
 “and Mr. Fillebrown and myself continued on through
 “the swamp with those levels; ran across the swamp
 “until the tules got so thick that we could not get
 “through very well, and the water seemed to spread out
 “there very wide; so we took the level of the water-

"surface, and made it as nearly at right angles to the
 "swamp as we could, to the eastern margin of the
 "water which was spread out. When we reached this
 "point on Section 4, somewhere in Section 4, I cannot
 "say exactly where it was, the water was spread out over
 "the ground; was just seeping and running along; it
 "was not an inch deep in most places; just enough to
 "spread out. We went on through that until we
 "reached a pond of water that seemed to be about
 "knee deep. That was on Section 4, still keeping on
 "the same course. Up to that point we kept the course.
 "Then the weeds and tules were so high in our direct
 "course that we had no way to get through them; we
 "could not carry the wagon to mash them down: we
 "went around through an opening, a slight depression
 "in there. The wagon left us when we first struck the
 "water, before we got to this point. Here we made a
 "deflection north of about 200 yards. Then we went
 "on as nearly our same course again as we could, from
 "that point. We could not get back to it, exactly. We
 "were going through this water knee-deep until we
 "came to where the water was running. We took the
 "surface of the water there, of the depth of it, which
 "was the deepest water we found in the swamp
 "in crossing. I don't remember the exact depth. I
 "think it was nearly waist deep. It was 2 feet .7, I
 "think. That was the deepest water we found. We
 "had gone through the water; I should judge,
 "about half a mile. We took the level of the
 "water there, and then went through and took as
 "nearly the same course as we could to the west mar-
 "gin of the swamp; and when we got near to the west
 "margin of the swamp, we found the edge of the
 "water, and then we continued on in the same way, the
 "same course, sounding the depth as we went along.
 "Its greatest depth was 1.4. Where we struck it, it
 "was 2.7, I think about waist deep.

"Q. How wide was the deepest water?

"A. It was probably 300 or 400 yards wide; wider
 "than that. Where we first struck the point knee-

"deep was a continuation of that water. The surface of the water was the same all the way through there, and it got deeper and deeper until we got to this point. Then we went on westward, and the next deepest water we came to was 1.4, and it ran from there to nothing; there we reached the western margin of this water.

"Q. How wide was the whole body of water you crossed there?

"A. I think it was a mile, or a mile and a quarter, from where we first struck it." (T. IV., fols. 1114 to 1121). *File also*, testimony of Fillebrown, T. IV, page 61 *et seq.*, and of L. Crusoe, T. IV, page 51 *et seq.*

We desire, here, to call you Honors' attention to the testimony of Wible, relative to the spread of the water which entered the swamp from the break in the canal, about Section 16 or 21, T. 28 S., R. 22 E.

S. W. WIBLE (for plaintiffs):

On the 24th of April, 1881 (T. II. fol. 1941, *et seq.*), the same day that James and others made their trip through the swamp, Wible went down on the "west" side of the swamp, past Crocker's Hog Camp, to the Tule House, and then southward on the east side of the swamp until he struck the water somewhere in the vicinity of the Round Corral. He followed that water up some distance, keeping to the east of it until he got up to Section 33, T. 27 S., R. 22 E. "When I got up to Section 33," says he, "I found some overflow, but I drove right through it. I didn't examine the width of it." (Fol. 1992.) He then crossed "the channel" on Section 3, T. 28, S., R. 22, and went to the high land on the east side; "then I started and went clear across, clear across the slough to the break, above the break. * * When I crossed over to the east, I went south, I think, somewhere about Section 11.

"Q. After you got over on the east side, you came back above the break, you say, to the west side; followed the water around?

"A. Yes, sir. * * I struck high ground *about a mile, or a mile and a half, above the break*. I would have to go about a mile and a half to the north before getting to the break, from where I struck it on the west side, after crossing from the east." (Fols. 1995 to 1997).

"Q. Do you know whether there was any water standing in there from Section 21 down to 24 in T. 28 S., R. 22 E?

"A. I suppose there is some. * *

"Q. Isn't it standing all over the country around through there?

"A. No, I don't think it is around all over the country—but then I think there is water standing outside of the channel there." (Fol. 1995).

Wible fixes the break as "somewhere in Section 16; about Section 16 or 21, T. 28 S., R. 22 E." (Fol. 1961).

Now Wible *followed the water around* from the east side of the swamp to the west and came out on the west side a mile or a mile and a half *above*, that is south, of the break; and he *supposes* there was more or less overflow through Sections 21, 22, 23 and 24, T. 28, R. 22. It therefore follows that this water which came from the break in the canal on Section 16 or 21 had not only spread nearly four miles east, but had also extended southward a mile or a mile and a half from the point where it entered the swamp.

As further demonstrative of the fact that there is no defined channel within the swamp through which water will flow, we call attention to the following testimony of

J. C. CROCKER (plaintiff):

"Q. Can you give me a general description of what portion of the land has been dry ever since 1873 and 1874?

"A. Sometimes it has been all dry.

"Q. That is not what I ask you.

"A. I understand. I could not tell you what proportion. The portion that would have water on it would be the southern portion, down towards Buena Vista Lake. * * I mean along up Weed Island, where the water first goes into the swamp. That is *from Wible's Camp down to Weed Island*. That has not been covered every year, but some years during that time the water went down the river and *stood at the head of the swamp, and then dried up.*" (T. II, fols. 564-5.)

"Q. For how long a period have you ever known the water to stand above the banks continuously?

"A. I could not tell you. *On portions I have known it to stand. I suppose it stood on the greater portion of it for a considerable length of time, PROBABLY A YEAR OR TWO.*" (T. II, fols. 695-6.)

We have dwelt at considerable length upon the question of channel or no channel within the swamp, for the reason that if there be no defined channel to guide the flow of water, it then matters not how much or how often the water reaches plaintiffs' land. By establishing as a fact, that there is no water channel to these lands, we undermine the very foundation of plaintiffs' case, and, as all other issues are thereby rendered immaterial, clearly show that the judgment of the Court below must be sustained.

We ask your Honors, however, to bear with us still a little, that we may also show that the flow of water to the swamp is not usual or accustomed, but, as stated in the Findings, is of rare and uncertain occurrence.

There are but two ways for the water to reach the swamp, one from the overflows of the river or lakes and the other from the seepage and percolation mentioned in Finding 70.

FIRST: AS TO OVERFLOWS:

We have seen from the testimony of Macmurdo, Fillebrown, Crusoe and others, that in April and May,

1881, the water was spread out over the swamp at its southern end; and we have seen from the testimony of James Taylor, McClung, McLean, Wible and others, how the water, discharged from the break in the canal, was spread from the east to the west side of the swamp through Sections 10, 9 and 8, T. 28 S., R. 22 E., and through Sections 10, 9 and 8, T. 27 S., R. 22 E., and southward, even, a mile and a half *above* the break. We know from the testimony of these witnesses that these two bodies of water were entirely disconnected; that between them the swamp was dry. We also know that these bodies of water were neither of them flowing in any defined course or channel, but, on the contrary, were each of them spreading generally and indefinitely over the swamp.

From the testimony of those witnesses who have watched the waters spreading over the swamp, and of those who have taken actual measurements of the amounts of water entering the swamp, it is incontrovertible that whatever water now reaches the swamp spreads and squanders itself over the surface thereof, and does not flow in any defined course or channel.

We have already seen by the testimony of Godey, Hudson, Barker, Tracy, Crocker, Briggs and others of plaintiffs' witnesses, that from as early as 1854 the sloughs and channels within the swamp have ever remained the same. That being so, it of necessity follows that whenever in former years the water reached the swamp, whether from overflow of lake or river, or from direct flow, it there spread and squandered itself the same then as now.

Now, these witnesses of plaintiffs, Barker and others, assert positively that during all those years, whenever they visited or saw this Buena Vista Swamp, the waters therein were, except in very rare times of excessive floods, *confined to the channels and within banks averaging from fifty to two or three hundred feet wide.*

For instance:

JOHN BARKER (for plaintiffs), who was along the "slough" every year from 1854 to 1859, at times hunting, and at times there "for the purpose of examining the sloughs and connections between the lakes all the way along," is asked:

"Q. In 1856, was the water running *in the channel*?

"A. It appeared to be wherever we struck it." (T. II, fols. 312-13). "In a great many places where I went into the slough, we followed in the elk trails to get through, and in other places, where the mus-tangs had broken a trail in, to get to the water."

So the water was not spread out in the swamp then; to get to water he had to hunt for it, had to follow the trails of wild animals whose instinct lead them to those places where water could be found.

"Q. In following through there, *how wide did you find the stream of water*?

"A. *At the places where I saw it*, at that time (1856), "I should think it must have been 30 or 40 yards wide." (Fols. 314-15). Later in the fall of 1856 "the condition of Buena Vista Slough was very similar to what we saw it before." (Fol. 317).

"Q. What was the condition of Buena Vista Slough in 1857, as compared with its condition when you were there, in 1854, 1855 and 1856?

A. Very similar." (Fol. 322),

In 1858 the condition of the slough was about the same as before.

"Q. Was the channel the same as you found it the years before?

"A. *I could not see any difference in it.*" (Fols. 324-5).

In 1859 he found the same condition of things.

"Q. Was there any change in the condition of affairs from the time you were there on other trips than when you were there in 1859?

"A. None that I could see." (Fol. 326).

"Q. I understand you to say, you "found no perceptible change in any of those trips?

"A. I didn't notice any." (Fol. 329).

On Cross-examination:

"When we went to the *slough* we would go for the purpose of getting water." (Fol. 338).

"Q. Your opinion is that the water was running at any place you found it at least 4 feet deep, and it was 40 yards wide?

"A. Well, yes, I expect so, at any place where I found it; about that rate." (Fol. 341).

"Q. That was the condition, I understand you, all along from 1854 to 1859, inclusive?

"A. Yes, sir; it approximated that, I think, so far as my observations would go." (Fol. 342).

J. M. LEWIS (for plaintiffs), familiar with the swamp ever since 1862:

"Q. What has been the condition of the channel that runs along through the body of swamp land of Buena Vista slough, running along this body of swamp land, since you have known it, from Goose Lake to Tulare Lake?

"A. Generally it has been confined pretty well to the channel, all of the way down." (T. II, fol. 1053). Though asked as to *channel* the witness referred to *the water*, as his answer shows; and the same, when he says that "Between Goose Lake and Tracy's Crossing, it seems to be mostly confined to the channel." (Fol. 1056).

It is unnecessary for us to consume further space by citing testimony to support such fact, for plaintiffs not only admit the fact, but themselves urge it, again and again, in their Specifications of Insufficiency.

In their 8th Specification (T. V, fol. 926), they say that "It appears by the evidence that the waters * * do not spread from side to side over the body of swamp and overflowed lands *except in extreme high water or floods.*"

In their 10th Specification (T. V, fol. 929) they say that "*Except in cases of extreme high water the water would be mostly confined to the banks of the slough.*"

In their 15th Specification (T. V, fol. 942) they say that "The waters, *except in times of extreme high water, are almost wholly confined to the natural water channel, or channels running through said lands.*"

In their 55th Specification (T. V, fol. 1024) they say that "It appears by the evidence that the waters of Kern River which have reached the lands of plaintiffs, after reaching said lands, have been confined to a channel or channels, *except in times of extreme high water, when the banks of said channels may have been overflowed* FOR A LIMITED TIME."

It being, then, a fact both admitted and established, that it is only *in exceptional times of extreme high water or flood*, that the waters which reach the swamp spread over the surface thereof, as we have described above, it inevitably follows that:

FIRST: The waters of the river or of the lakes are not wont or accustomed to flow to Buena Vista Swamp, and do not reach the swamp, unless in times of overflow from flood or freshet.

SECOND: Such overflows of the river or of the lakes are but rare and uncertain.

Again:

F. A. TRACY (for plaintiffs), familiar with the swamp from 1863, is asked:

"Q. Now, you have been down there, and are familiar with it ever since 1863. Isn't it a fact that there has been, taking one year with another, a matter of uncertainty whether there would be any water running down there the greater portion of the year?"

"A. *It has been a matter of uncertainty.* There are certain years it did not run since I have been acquainted with it." (T. II, fols 1002-3.)

ELISHA STEVENS (for plaintiffs) was first on the swamp in 1845, and has been more or less familiar with the upper portion of it ever since. He is asked:

"Q. When the water ran down the South Fork into the east end of Kern Lake * * where did it go?

"A. It went to Tulare Lake; that's where it went to.

"Q. How did it get there?

"A. I caught fish along there. It looked like fish would not come there without water. In dry weather it was not all the way, but IN MANY FRESHETS *the water would come through* and bring fish to Buena Vista Lake, *but not always.*" (T. II, fols. 138-9.)

"Q. Now, Captain, you say that this whole country, from the mouth of New River down to Tulare Lake, at certain periods of the year would be covered with water along Buena Vista Slough, in high floods, from Buena Vista Lake clear down to Tulare Lake?

"A. No; *only in times of freshets.*

"Q. In times of high freshets, I speak of.

"A. No, not too high; ordinary freshets.

"Q. In times of ordinary freshets the whole country from Buena Vista Lake to Tulare Lake would be one continuous sheet of water?

"A. Not the whole country, *but the water would run* and we could catch fish" (fols. 169-70). In times of *very high water* it would pass the water clear through" (fol. 172).

JOHN BAKER, as we have seen, was along the swamp from 1854 to 1889 inclusive, much of the time, for the very purpose of examining the channels in the swamp. During all those years he found the condition of the channels and the amount of water therein, *just the same*; could perceive no difference in the amount of water or in its flow. In 1879 he went back to the swamp again and found it, so far as water was concerned, just about the same as he had found it in former years.

"Q. What was the condition of the water?"

"A. Well, *there was a channel* OF WATER *there.*

"Q. The same way?

"A. Well, about the same way; in a very similar way, as near as I can tell; *no material change that I could discover.*

"Q. No material change from the time you first saw it to the last?

"A. It might have been more or might have been a little less. I FOUND THE SAME GENERAL APPEARANCE." (T. II, fols. 358-9).

Now in 1879 no water whatever flowed out of the lakes, for, as we have already seen, Wible had the dam at Cole's closed up, so that even had there been water there it could not have flowed from the lake; besides, Wible says: "There was no water to flow out." (*Ante*, page 83.) "In 1879," says he, "there was no water flowing out of the lakes" (T. II, fol. 1829). Nor prior to April, 1879, was there any water flowing from the river to Buena Vista Slough, for Farman, who lived right on the bank of the river, in Section 2, T. 30, R. 26, says that prior to April 1st, 1879, no water had come down the river during that year (T. II, fol. 2137). Nor was there any water flowing in the slough except from, seepage and percolation, (of which we shall presently speak), for:

Crocker says: "We were pumping in 1879."

"Q. Then you did not have any water in 1879?

"A. No, sir.

"Q. Not even in the early part of the year?

"A. No, sir." (T. II, fol. 566).

"Q. Mr. Crocker, what was the condition of the water in that slough in the first part of 1879; the first months?

"A. There was very little water, if any. I think no water except in holes" (fol. 718).

R. B. Still says that in 1879 there was no water except in holes. (T. II, fol. 768).

Epperly—to whose house Barker went when he visited the swamp in 1879 (*vide*. T. II, fol. 330)—says that from the fall of 1878 until the last days of April, 1880, there was no running water there (T. II, fols. 281 to 283).

We must then conclude that the water which Barker found in the swamp in the years 1854, 1855, 1856, 1857, 1858 and 1859, was not regularly flowing water, but, like

that described by Godey in 1866 (*vide ante*, page 135), was merely seepage, water draining from one hole to another; and this conclusion is rendered even more certain by the testimony of Barker himself, for:

FIRST: As we have already seen, when he wanted to get water he would follow the elk or mustang trails to some slough or water-hole, and

SECOND: Though he went to the swamp for the very purpose of ascertaining whether there was a water communication between Buena Vista and Tulare Lakes, and though he states that at several places where he went to "the channel," he found the water flowing, yet when asked:

"Q. Do you know, then, Mr. Barker, that there "was a continuous running stream during the time "you were there, from Buena Vista Lake to Tulare "Lake?

"A. I know there was one, *wherever I got into it*, "that is all.

"Q. Well, do you know there was one from Buena "Vista to Tulare Lake?

"A. No, sir; not to be able to say that I have been "the length of it." (T. II. fols. 336-7).

Now, what man of ordinary intelligence, who had been along that swamp for six consecutive years, most of the time for the very purpose of examining whether there was an open water communication between the two lakes, and had found a channel from 30 to 40 yards wide and from 4 to 15 feet deep, *wherever he got into it*, when asked in a trial like this, whether there was a continuous running stream from one lake to the other, would so evade the question as Barker did, unless it be that he had some reason for knowing, or at least believing, that there was no such continuous stream? We think that Barker *did know* that there was no continuous stream between the two lakes; for, though he states with the utmost assurance that *wherever he went into the channel between the lakes he found a stream 30 or 40 yards wide, flowing northward with considerable current—even fixes the rate of*

current as "a one or two-knot current"—when asked as to the water flowing out of Buena Vista Lake, is not able to say that it was running. "I went," says he, "to the point where Buena Vista Slough leaves Buena Vista Lake. *I think* the water was running there. It "was running, *I know*, a short distance below. I could "not say how much was running; but there was communication all the way through.

"Mr. Garber—Q. How is that? I did not hear.

"A. I say, *I could not say whether it was running or "not right there; right where it leaves the lake."*

"Mr. Houghton—Q. Was there an open water communication all of the way between Buena Vista Lake "and Tulare Lake?

"A. Wherever I could *get to it* or *see it* there was." (Fols. 315-16.)

We think that the fact of his not being able to say that the water was running at the point where the slough leaves the lake, proves conclusively, under all the circumstances, that it was not running, and that he knew that it was not running.

In further proof of the fact that the waters of Kern River have not been accustomed to flow northward to Buena Vista Swamp, we call your Honors' attention to the fact that Kern River is a sediment-bearing stream whose waters are highly impregnated with sand. (*Vide ante pp. 92 et seq.*)

Relative to this flow of sand Macmurdo is asked:

"Q. Have you observed this river, say from the "Railroad Bridge down to where it passes into Buena "Vista slough?

"A. Yes, sir.

"Q. How is the bed of that river? Does the water "carry much sand in flowing?

"A. Yes, sir, it carries a good deal of sand.

"Q. It depends upon the stage of water in the "river?

"A. If the river is high, of course the current has "a greater velocity, and carries more sand.

"Q. At the forks of the river—the south, middle and north branch—is there much movable sand at this point?

"A. Yes, sir. The current of the river varies at times of high water by reason of the action of the sediment and sand flowing.

"Q. Have you ever observed the slough, whether there is much sand in the slough?

"A. At a good many points in the slough I have noticed a great deal of sand. I have noticed the difference in the elevation of these sand-bars in the slough at many times.

"Q. Does this sand, this sediment that flows with the water, run down immediately below what is known as Wible's camp?

"A. *I don't think it reaches as far down as that.* It reaches a point some distance between where the middle branch enters the slough and Wible's Headquarters camp.

"Q. Does the sand flow northwardly from the south branches in the slough?

"A. It does *at present*, or did at the time *when the levee was closed up across Cole's Bridge.*" (T. IV, fols. 1387 to 1390.)

On cross-examination Macmurdo says:

"The waters of Kern River carry sand into and down Buena Vista Slough. But I cannot definitely fix the point where it ceased to carry sand. I think it is somewhere on Sec. 23, T. 30, R. 24. *If there is any sand carried below there, I think it has only been recently.* I was along that part of the slough several years ago, hunting, and crossing at various times, and I don't remember having seen any sand in the slough below that point. If there was any sand in the water I would possibly have known it." (Fol. 1403).

On re-direct examination:

"I think I said it was Sec. 23, on T. 30, R. 24, where the sand ceased flowing in Buena Vista Slough. I

“have been down on the slough when it was nearly
 “dry. I have never been down there when there
 “was not water standing in holes. I have seen sand
 “very nearly to that point. Below that the slough
 “was pretty much all deep. There were holes all
 “along there. But I don’t remember having seen
 “sand. I have seen it down as far as the north-
 “west corner of Sec. 24, T. 30, R. 24. And I don’t
 “think I have seen any sand beyond that. *Never saw*
 “*any sand north of the levee at Wible’s camp.* I have
 “been through portions of that slough north of Wi-
 “ble’s camp when portions of it was dry. *Had there*
 “*been sand there I should have seen it.*” (Fols. 1405-6.)

SECOND: AS TO SEEPAGE AND PERCOLATION:

We do not dispute the fact that at times water does reach the swamp and at times flows therein from one hole to another; but we contend that the more usual and accustomed source of supply is from seepage and percolation, as described in Finding 70, and not from any surface flow.

C. W. CLARKE (for plaintiffs) says, that through the body of swamp land between Tulare and Buena Vista Lakes there is a great deal of soil that is very black and rich; that this soil is formed from the decomposing of vegetable matter; that underneath this soil is a kind of quicksand; that the land itself is a mere surface deposit. (T. II., fols. 1193 to 1195).

MILTON NORTON (for plaintiffs) says:

“The land along Buena Vista Slough is some kind
 “of an adobe and a kind of rotting vegetation.” (T. II,
 fol. 1729).

ELISHA STEVENS (for plaintiffs):

“Q. Has there been any time, Captain, when the
 “waters which run down Kern River * * didn’t
 “continue on down through Buena Vista Slough to
 “Tulare Lake?

“A The waters in low times would not run every-

"where. There were ^{places} ~~bases~~ in dry weather where it was passable in that slough, but we could always find water at some point" (T. II, fols. ¹⁴¹⁻² ~~1041-2~~). "In the driest season sometimes it would be very low, but there would be water all along occasionally." (Fol. 173). "There never has been a time but what there has been water. There is always some water, running water down at the lakes, and there would be holes. In some places you could not find water that was a sheet of water, and in some places muddy. * * Low down where the tule was very wide it run." (Fol. 174).

GODEY (for plaintiffs) says, that in September, 1866, about the middle of the swamp, he found two long holes of water and a little water running between the two. (T. II, fol. 126.) Clarke says that in 1866, the whole swamp was perfectly dry. (T. II, fol. 1196).

HUDSON (for plaintiffs) says, that in his trips through the swamp he always found running water every time he was there. *Not the whole way, but AT DIFFERENT POINTS.* (T. II, fol. 208).

CROCKER says there are holes in the swamp which he has never known to be without water. Says he, "from Wible's Camp down there three miles * * "I have never seen it entirely dry there in my life. It is not dry there now.

"Q. From Wible's Camp down the slough?

"A. No, sir.

"Q. Where does the water come from?

"A. I suppose it went down the river, some of it.

"In the dry seasons it soaks in." (T. II, 576-7.)

BARNES (for plaintiffs) says:

"In 1880 the whole of Buena Vista Lake drained right down into these holes, into Buena Vista Slough, into the channels of what we call Old Buena Vista Slough, between Buena Vista and Tulare Lake. * *

"The lake itself has drained itself into Buena Vista Slough perfectly dry" (T. II, fol. 1374). We know, from the testimony of nearly all the witnesses, that no water whatever flowed out of Buena Vista Lake in either 1878, 1879, or 1880.

R. L. DIXON (for defendant) says, that at times the water will rise in these holes and flow from one to another; and he mentions several occasions when he has seen this rising of the water, at times when there was no water running either from the river or from the lake. (T. III. fols 532 to 534.)

JAMES (for defendant):

"Q. Were you along Kern River much of the time in July, 1879?

"A. In 1879 I was along the river a great deal.

"Q. Was this the time that you say the water was running a little towards Wible's headquarters?

"A. Yes, sir.

"Q. Was there any water in the river at that time?

"A. No, sir; there was only a little water *running in places from one hole to another*; I could see the water running. I am speaking now of the slough; there was no water in the river at that time." (T. III, fol. 168). Nor was there then any flowing out of the lake, as we have seen above.

As to the name "Buena Vista Slough."

That the name "Buena Vista Slough" is usually applied to Buena Vista Swamp appears, throughout the whole testimony, so frequently from the mere use of the word *slough* by the various witnesses when it is evident they are referring to the *swamp*, that we deem it almost superfluous to make special reference thereto. However, we cite one or two instances:

SOUTHER:

"Q. What do you mean by the 'slough,' Mr. Souther?

"A. I mean *that tract of swamp and overflowed land*.

"Q. You are not, in the use of that word, referring to any particular channel, are you?

"A. No, there was no particular channel." (T. III, fol. 678.)

MACMURDO: "I was just going across there nearly at right angles to the general direction of the *slough*.

"Q. What slough do you mean?

"A. *The swamp*.

"Q. By the use of the word 'slough,' then, you mean the whole 'swamp,' did you?

"A. Yes, sir," (T. IV, fols. 1174-5).

D. G. McLEAN: "We waded across the *slough*; * * I mean by '*slough*' the water, the margin of the tules, *the swamp*." (T. IV, fol. 1515.)

"Then we crossed the *slough* again, crossed the swamp land.

"Q. In using the word 'slough' you are using it in the same sense that you did before?

"A. As I did before—as *the swamp and that entire body of land right through*." (T. IV, fols. 1519-20.)

CROCKER. "No one pumped water in *Buena Vista Slough* in 1871" (T. II, fol. 558). He unquestionably meant the *swamp*.

Thus far, in support of the Finding that there is no water-course within the swamp, we have cited *positive* testimony only. There is, however, a certain amount of what may be termed *negative* testimony, tending to establish the same fact, and which, when considered in conjunction with the positive testimony already adduced, shows conclusively that no water-course flows to plaintiffs' lands.

We refer your Honors to plaintiffs' Exhibits Nos. 29, 30, 31, 32, 33, 34, 35, 36 and 37—nine photographic views, by Mr. Watkins, of points along Kern River from the Calloway head-gate to the mouth of the Middle

Branch of New River; photographs immense in size and artistic in ~~their~~ execution. Three whole days—the 9th, the 10th and the 11th of January, 1881 (T. II, fol. 2307)—were devoted to selecting the particular views desired and producing the *negatives* thereof. The very nature of the work, the size of the photographs, their number and elegant finish, show that it must have cost no small amount of money to produce this evidence; show, too, that the particular points photographed were selected with care and design. Yet, whilst plaintiffs go to this trouble, expend this money to picture before the Court the various features and conditions of Kern River at these several points, and of Buena Vista Slough at the mouth of the Middle Branch, as it now exists—after the waters, turned northward by the artificial obstructions at Cole's Crossing, have scoured out, deepened and enlarged that slough at that point,—features and conditions about which there is no dispute, they show not one glimpse of the pretended channels within the swamp; not one glimpse of those “deep holes” which Crocker calls “a water-course for three miles below Wible's”; nothing at any point north of where even the little water, which in times of high water flows through the Middle Branch, turns southward on its course to Buena Vista Lake; nothing at any point within four miles of their, so called, “riparian” lands. And why? Why this drawing of the veil over these sloughs and channels which they tell us exist within the swamp and which, if they do exist, it is most to their interest to show—facts about which there is so much dispute, and facts which, if they be facts, it was so easy for them, with their photographic appliances then at hand, to reproduce? Can there be any doubt as to the answer? They dared not. There is no possible construction of this hiding of their so-called channels, this seeming dread to approach their own lands, other than that they knew that by picturing the condition of the swamp as it really is, the sloughs and the channels therein as they actually exist, they would belie every witness they placed upon the stand to

prove a water-course, and hopelessly destroy their claim to riparian rights? We submit that this negative evidence is proof positive against them.

Having now shown that from the Calloway head-gate to the swamp there is no continuous stream or water-course; that between the point of defendant's diversion and plaintiffs' lands, the waters of Kern River, in their natural, usual and accustomed flow, flow away from instead of towards those lands; that the flow of water at the one point can in no manner be identified with the flow of water at the other; that to, through, over or upon these lands of plaintiffs there is no water-course or defined stream, no usual flow, no continuous channel—"nothing that the most prejudiced or skeptical could construe as a channel"—we have, we think, destroyed the whole of plaintiffs' case. For, even were there no evidence whatever in support of the other findings, the testimony above cited amply justifies all those findings and parts of findings—especially Findings Nos. 3, 4, 5, 7, 8, 9, 11, 12, 13, 14, 16, 17, 18, 30, 31, 40, 45, 46, 47, 48, 49, 65, 66, 70, 71, 72, 78 and 79—which in any manner relate to Buena Vista Slough or to the Swamp, the flow of water, "water-courses," channels or depressions therein; and, as necessary corollaries thereto, it results:

1st. That, as stated in Finding 15: The diversion, appropriation and consumption of the waters of Kern River by the defendant, has not prevented or interfered with the natural flow of said waters or any part thereof, to or through Buena Vista Slough, at any point north of where New River enters it, or to, along, by, through, over, or upon the lands of plaintiffs or any portion thereof; nor has it prevented or interfered with the irrigation of said lands or any part thereof, or the making the same fit for cultivation or pasture, or the supply thereon of water for stock or agricultural or domestic or other purposes.

2d. That, as stated in Findings 20 and 22: The defendant has not prevented, or in any way hindered,

the waters of Kern River from flowing to, along, by, through, over or upon the lands of plaintiffs.

3d. That, as stated in Findings 24, 25, 26 and 27: The failure of the water to flow through Buena Vista Slough to plaintiffs' lands, and to irrigate and moisten said lands, was not attributable to, or by reason of any diversion or appropriation of the waters of Kern River, or other act, by defendant; nor did said lands become dry or deteriorated in value by reason of any diversion or appropriation of water, or other act, by defendant.

4th. That as stated in Findings 28 and 35: A continuance of the diversion and appropriation of the waters of Kern River in the future to the extent it has taken place heretofore, and to the capacity of the Calloway Canal, will not deprive the lands of the plaintiffs of their natural moisture, or cause them to become dry, or deteriorated in value, or deprive them of water for general uses, or prevent them from being irrigated or moistened by the waters of said River, or cause them to dry up, or to be continually drying up, or to become less fit to produce crops and support cattle.

5th. That, as stated in Finding 36: It has not become and is not necessary in consequence of the diversion and appropriation and consumption of the waters of Kern River by defendant, to pump water on plaintiffs' lands, nor will it in the future be necessary by reason of a continuance of such diversion, appropriation and consumption, to pump water thereon; and it has not been necessary, and will not unless defendant be restrained from diverting, appropriating and consuming the waters of Kern River be necessary to pump water on plaintiffs' lands, unless in extremely and unusually dry and rarely recurring years, but such pumping has not been and will not be in any manner necessitated or occasioned by any diversion, appropriation or consumption by defendant, or by any continuance thereof.

6th. That, as stated in Finding 43: The lands of

plaintiffs have not been, and will not be irreparably or otherwise injured or ruined, in whole or in part, by any diversion, appropriation or use of the waters of Kern River, or other act or acts, by defendant; nor will such acts of defendants be grievances to plaintiffs.

7th. That, as stated in Finding 45: The lands of plaintiffs have never bordered, or been situated, in whole or in part, upon any water-course or natural stream.

8th. That, as stated in Finding 46: No water-course or natural stream flows or flowed to, along, by, through, over or upon the lands of plaintiffs, or any part thereof.

9th. That, as stated in Finding 47: There is not and has not been any right whatsoever to the flow of the waters of Kern River, naturally or otherwise, incident or appurtenant to the lands of plaintiffs, or any part thereof.

10th. That, as stated in Finding 48: Plaintiffs are not and have not been, nor is or was any of them, the riparian proprietors or proprietor, owners or owner of lands on or bordering upon Kern River, or any of the branches, sloughs or channels thereof.

11th. That, as stated in Finding 49: Plaintiffs are not and have not been, and none of them is or ever has been, by virtue of the ownership, possession or occupation of their lands, or otherwise, riparian proprietors, owners, proprietor, or owner, or entitled to have the waters of Kern River, or any part thereof, flow to, along, by, through, over or upon their lands, or any part thereof, or to take out, divert, appropriate or use any of said waters.

12th. That, as stated in Finding 76: During the irrigation season of the year, the amount of water diverted from Kern River by defendant is not sufficient to materially affect, or substantially diminish, the volume

or amount of water usually reaching Buena Vista Slough—at least so far as plaintiffs are concerned; and, during the balance of the year, none of the water by defendant diverted would, if not so diverted, ever, in its natural flow, flow to or reach the lands of plaintiffs, or any part thereof.

13th. That, as stated in Finding 77: During the period from July, 1878, to the commencement of this action, none of the waters of Kern River by defendant diverted, would naturally have flowed to or reached the lands of plaintiffs, had they not been so diverted.

The chief contention in this case has been upon the question of water-course, and we have therefore devoted ourselves, almost exclusively, to the findings thereon. The objections of plaintiffs to the other findings were made, we think, more in a spirit of contention than as possessing any real worth or intrinsic merit. We shall therefore pass over them as briefly as possible.

3.

The Calloway Canal and Defendants' Appropriation.

The defendant, the Kern River Land and Canal Company, was incorporated under the laws of the State of California May 18, 1875, for the purpose of constructing the Calloway Canal for irrigation, etc., and of transacting such business as generally appertains to Canal Companies. These facts are set forth in Finding 44, to which finding plaintiffs make no objection.

Finding 51: *On the 4th day of May, 1875, the grantors of the defendant desiring to appropriate seventy-four thousand (74,000) inches of the waters of Kern River, measured under a four inch pressure, posted a notice in writing in a conspicu-*

ous place at the point of intended diversion, which is in these findings specified, and stated therein: First, that they claimed the waters of Kern River there flowing to the extent above mentioned. Second, the purposes for which they claimed it, and the place of intended use, as is in these findings specified. Third, the means by which they intended to divert said water, and the size of the ditch or aqueduct through which they intended to divert it, as in these findings is specified. A copy of said notice was within ten days after it was posted as aforesaid, recorded in the office of the County Recorder of the County of Kern, in which county said notice was posted. Within sixty days after said notice was posted, the defendant commenced the excavation and construction of the said works in which it was intended to divert said water, and prosecuted said works diligently and uninterruptedly to completion, and thereby diverted said waters to the place of intended use.

The original recorded copy of the notice of appropriation was offered and read in evidence, and is set out in full in Trans. III, fol. 1650, *et seq.*

This notice bears date the 4th day of May, 1875, and is endorsed (*vide* Trans. III, fol. 1659):

“Recorded at request of O. P. Calloway, May 4th, A. D. 1875, at 2 o'clock, P. M., in Book Volume One of Water Rights, pages 37, 38, 39.

“[SEAL.]

“F. W. CRAIG, Recorder.

“Recorder's fee, \$4.”

The record itself was also introduced and read in evidence (Trans. IV, fol. 30 *et seq.*). And on the face of the record is the following entry (*vide* Trans. IV, fol. 40):

“Recorded at request of O. P. Calloway, May 4th, A. D. 1875, at 2 o'clock P. M.

“F. W. CRAIG, Recorder.”

A. C. MAUDE says: “I saw the notice of the Calloway. It was posted above the Railroad Bridge, perhaps 100 yards; something like that. I saw it on the 7th day of May, 1875. (Trans. III, fol. 1635-6.)

W. McFARLAND also saw the notice posted "some-
 "time along in May 1875," and again the following
 June. It was posted 200 or 300 feet above the Rail-
 road Bridge. (Trans. IV, fol. 10). He identifies the
 record as being a copy of the notice posted (fol. 271).
 McFarland says: "I heard the Calloway notice read
 "here in Court last Friday, partly by Mr. Flournoy and
 "partly by Mr. Haggin" (*i. e.*, the original copy, *vide*
 Trans. III, fol. 1650, *et seq.*)

"Q. Did you recognize that as the same notice you
 "had seen posted?

"A. Yes, sir; as near as I can recollect, that was
 "the same notice. I know it was the same.

"I don't know what became of the notice I saw. It
 "was written on paper and posted on a board. I have
 "no idea what became of the paper I saw. I suppose
 "it was destroyed the same as any other paper that was
 "posted up, by the elements." (Fols. 14-15.)

"Q. Did you know Mr. Calloway personally?

"A. Yes, sir; he is now dead." (Fol. 40.)

E. H. DUMBLE:

"I was shown the notice which was posted appro-
 "priating water for that canal. Mr. Calloway showed
 "me the notice. It was posted on a willow tree, rather
 "on the southeast side of the tree, tacked on a board,
 "and the board nailed to the tree. That tree was situ-
 "ated about 400 feet above the Railroad Bridge.
 "I read the notice." (Trans. IV, fol. 59-60).

C. G. JACKSON:

"I saw the notice of appropriation in May, along
 "about the 7th or 8th, 1875. I saw it posted above
 "the Railroad Bridge, about three or four hundred
 "feet from it; it was posted on a tree. I read it."
 (Trans. IV, fol. 76).

Jackson identifies the record as a copy of the notice
 posted (fol. 84).

S. H. ANDERSON:

"I know the Calloway Canal and where it is located.
 "I first knew about the canal a few days after Mr.
 "Calloway came here with the intention of taking it
 "out. That was in 1875; sometime in the fore part of
 "May. I got acquainted with Mr. Calloway a short
 "time after he came. I had some talk with him
 "about his canal or intention of taking the water
 "out of the river. The first thing I saw of his canal
 "was his notice there. I saw the notice posted.
 "It was on a tree on the north bank of the river,
 "just above the Railroad Bridge, immediately above
 "the upper end of the island that forms the Mc-
 "Caffery Slough. It was on a black willow tree.
 "I remember that the limbs were just away from
 "it at the bottom of where he had posted the no-
 "tice. I saw the notice sometime in May, the fore
 "part of May." (T. III, fols. 1723-4).

On Cross-examination:

"I saw the notice posted at the head of the Calloway
 "ditch in 1875, in the fore part of May—the 9th,
 "or 10th.

"Q. How are you able to fix the date?

"A. I got acquainted with Mr. Calloway on the 1st
 "of May; and it was only a few days after that that I
 "saw the notice there. He told me he was going to
 "put it up. And besides, the land immediately ad-
 "joins my homestead. That is the way I fix the date.
 "Mr. Calloway had only been here a few days before I
 "saw that notice. The notice was posted on a piece
 "of board, and posted to a black willow tree. I have
 "seen that notice since. I saw what was left of it a
 "year afterwards" (fol. 1737-8).

Vide also testimony of W. P. McCord, (Trans. III,
 fols. 1467 to 1469); and of Souther (T. III, fol. 730).

The Calloway canal heads on Sec. 13, T. 29, R. 27.
 (T. II, fol. 279; *vide* also, Map I).

Calloway and his associates in the Calloway appropriation, deeded all their appropriation, water-right, canal, etc., to this defendant on the 18th day of May, 1875. This deed was offered and read in evidence (T. IV, fol. 1597). It was duly acknowledged, and was recorded June 14, 1875 (fol. 1608).

“Finding 57: * * *Within sixty days after the posting of the notice defendant surveyed and staked out the line of the Calloway Canal as now constructed, and as described in said notice of appropriation, and began the excavation and construction of said canal.*”

W. B. CARR:

“Q. Did you know Mr. Calloway?

“A. I did. I saw Mr. Calloway when he was at work on what has been called the Calloway Canal, in July, 1875; I had a conversation with him at that time in regard to that work, while he was engaged in the work.

“Q. What did he state about the work?

“A. He said that *he was building a canal for the company—for the Calloway Company, or the Kern River Land and Canal Company. That is the company defendant in this case; it has always been known here and spoken of as the Calloway Canal Company.*” (T. IV, fols. 1653-4). “I was out there a good many times, from July, 1875, to the first of January, 1876. We were negotiating for that canal for about two or three months, and I examined the line of the canal, as there had been some land located, and it was a question where the canal ran. *I went over the line with Mr. Calloway examining it, and the stakes were there, and he pointed out where it was, and he had a map designating some of the lines. It was staked out, just where the canal was built afterwards; the stakes commenced at his work and ran on out over the plains.*” (Fols. 1655-6.)

W. P. McCORD:

"I saw them at work before they put the scrapers on; saw them at work, grubbing and cleaning out the head of the ditch before they put on the scrapers; my impression is that it was in 1875, I think in June. They put scrapers on in June or July, and the grubbing that I saw done was in June or July, I think; they commenced scraping in a week or ten days after they commenced grubbing; *before that they had been surveying and leveling, to see where they could take it.*" (T. III, fols. 1470-1).

A. C. MAUDE.

"I saw a good deal of work done on the Calloway Canal. The first time that I crossed the river and witnessed the work on the ditch was on the 28th of June, 1875. I went up to the Allen place, right on the corner, where the ditch comes out at the bluffs at Mr. Allen's place. There they had a camp and were scraping and digging." (T. III, fol. 1660.)

S. H. ANDERSON:

"The first work I noticed them doing on the Calloway Canal was along in June, a little below the Railroad Bridge, in 1875. * * Six or seven small teams. They were grubbing and hauling out grubs, a short distance below where the present bridge crosses. That was in June, 1875. I was down there several times that summer. I was there in July. They were working further down." (T. III. fols. 1726-7.)

H. A. JASTRO:

"I know the Calloway Canal. I knew it first when Mr. Calloway started to build it. He was at work there in the summer of 1875. I sold him some sheep in June, 1875. Some of the Company's teams were working there then constructing a canal. They were scraping there for the purpose of constructing the canal; the Calloway ditch. I delivered the sheep

“near the old Rob house. It is where that deep cut
 “is that came out of the slough where the ditch com-
 “mences. They were working there then. * * *
 “(The witness examines Map No. 4, and continues):
 “That work must have been going on about Sec. 22,
 “T. 29, R. 27. He was right where the canal came
 “out of the slough. I could not say how many scrap-
 “ers there were. There were four or five teams at
 “work. It was about the middle of June that I sold
 “these sheep to Mr. Calloway.” (T. III, fols. 371-2.)

WM. McFARLAND:

“When I was there the second time, in June, I
 “went with some party to read the notice at that
 “time—went for that purpose at that time to look at
 “the notice, and to look at a piece of land. I think
 “we stayed over there, and around Calloway, where
 “he was working, perhaps two hours. Mr. Wilkinson
 “was along with me in the buggy; he got out. They
 “were working near there. They were at work on the
 “canal at that time right near there.” (T. IV,
 fols. 20-1.)

“Q. I understood you to say that you saw parties
 “at work at the time you have already referred to.
 “What time was that?

“A. That was the time I was out to look at this
 “piece of land, at the time I read this notice. That
 “was some time in June, 1875. The second time that
 “I saw the notice they were working along in the Mc-
 “Caffrey Slough.

“Q. Did you ever see them at work after that out
 “there?

“A. Yes, sir; along in the same year, the next
 “month, probably. It might have been the same
 “month. I think it was the last of June.

“Q. What was going on then?

“A. At that time they were working with scrapers,
 “in that bluff, up on the top of that bluff, near Robb’s
 “house.” (Fols. 40-1.)

E. A. DUMBLE:

" Q. Did you ever see any persons at work on this canal?

" A. Yes, sir; I have seen them a great many times.

" The first I remember seeing them at work was in June, 1875. I think it was about the last of June.

" They were at work then on the cut by the Butterbaugh house.

" Q. Where was that cut situated as to the canal?

" A. It is where the canal is taken from the McCaffery slough on to that point about where it leaves the McCaffray slough. It is a very deep cut; a very wide cut. I know that it was quite an undertaking when they were at work on it.

" Q. Heavy work?

" A. Yes; I think it was about eight or probably ten feet in depth. I saw them again in 1875, at different times. Every three or four weeks my business called me over on that side, and I have seen them at work. I saw them at work on the canal during 1875, every three or four weeks." (T. IV, fols. 63-4).

C. G. JACKSON:

" I saw parties at work on the Calloway Canal about the 1st of June of that year (1875), and after that I saw them during December or January; December, 1875, or January, 1876. The teams were at work there scraping out. When I saw them the second time, they were still at work a little beyond where I first saw them, beyond where the water is taken out of the McCaffray slough." (T. IV, fol. 79).

E. D. CROSS:

" I know the Calloway Canal. I think the first time I was ever out there and knew anything about it was along in May, 1875. I was out there with goods from Chester for Mr. Calloway, from Mr. Chester's store. When I went over there they were cleaning out McCaffray's slough, and working there. It was

"in May, 1875. They were just starting I believe at that time." (T. IV, fol. 1004).

WALTER JAMES:

"I first saw the Calloway Canal in 1875; I think about July. I then saw the camp and the men working on the canal, in its construction. That was near the point where the canal was taken from the McCafray Slough. They were at that time working in heavy cutting in what was known as the cut. At that time there was ten or twelve teams; some four-horse teams and some two-horse teams. That was about July, 1875. I saw it at different times through the summer of 1875, and I was on the canal in the early part of December, 1875. When I saw it at different times during the summer they were at work on it. I never saw it when they were not at work on it." (T. IV, fols. 868-9).

WILLIAM SOUTHER:

"I know the Calloway Canal, and I saw Mr. Calloway; saw him at work there, with his men. It was sometime in the spring or early in the summer of 1875 that I first saw anything in connection with that canal. I think I met Calloway in Bakersfield here one day, and we had a little talk relative to his tools, etc. What time that was exactly I can't tell. Probably it was about May or June. I saw the canal work afterwards. I went over there in the Fall or Summer, relative to getting some brush to build the Kern Island Canal. We cut some brush right close to the head, or by the slough. I think that was in June, or the early part of July, 1875. Prior to the cutting of the brush to put in the canal, we built a dam across the river, 1875. And this was prior to that. * *

"Q. Did you see any more work being done at that time on the canal?

"A. Mr. Calloway had some men down below the slough, below the Railroad Bridge, and had commenced making a deep cut from the slough, running

"out into the lands back when I first saw them. There
 "did not appear to be much work done at that time.
 "There had been a little when I first saw it; I think,
 "six, eight or ten men were at work with scrapers
 "when I first saw them, making a cut from the slough,
 "that took the water down, according to the notice.
 "I saw one of the notices sticking on the Railroad
 "Bridge, and there was one of the notices sticking
 "above. I suppose it was right at the commencement.
 "I did not read that notice to see what it said. It
 "was on a tree right close to where we cut the brush.
 "They commenced down below and made a cut out.
 "It was a wide cut that they were working at, I saw
 "them taking out the earth with scrapers; scraping
 "the earth out of this cut. I believe the cut was 60
 "feet wide. I did not measure the canal. I saw them
 "digging out the earth with scrapers at the cut. I
 "thought the statement was correct. He said it was
 "60 feet, and I presumed it was that. From seeing
 "the canal, I should judge it was 60 feet. This was
 "in June, sometime, I think. (T. III, fols. 728 to 731.)

Plaintiffs do not dispute the findings (57-58) that
 from its inception to the trial of this action defendant
 has diligently and uninterruptedly prosecuted the work
 of constructing said Canal. They object, however,
 that the evidence does not show that at the time of
 the commencement of this action defendant had *com-*
pleted the Canal to the point where it crosses Poso
 Creek.

Though we do not think this point material, we refer
 your Honors to the testimony of Roberts, showing that
 in April, 1879, the Canal was constructed to the Poso
 Ranch, and in May, '79, beyond the Poso Ranch (T. II.,
 fols. 275-6); and of Fillebrown, who says that by the
 12th of May, 1879, he thinks *the Canal was completed*
quite to Poso Creek (T. III., fol. 319).

Plaintiffs also object that the construction of the
 Canal did not cost as much as stated in Finding 57.

They, however, do not dispute the facts that from the head of the Canal to Poso Creek is a distance of thirty miles, and that at the time of the commencement of this action defendant had constructed thirty miles or more of side ditches. Now, Mr. Carr says that the cost of constructing the main Canal is \$3,000 per mile, and the cost of the side ditches is from \$500 to \$800 per mile. (Trans. IV, fol. 1665.) We then have, at this estimate, an expenditure of \$90,000 for the main Canal to Poso Creek, and from \$15,000 to \$24,000 for the side ditches constructed at that time.

Plaintiffs do not deny that upon the lands irrigated by the Calloway, irrigation is an absolute necessity, but they contend that the United States is not the owner of these lands, and that none of the lands irrigated by the Calloway border upon Kern River.

As to the latter objection, we refer to the testimony of Roberts, plaintiffs' own witness, who, being asked by plaintiffs themselves: "How much land is there bordering upon the river that is irrigated by that canal?" says: "I suppose 1,000 acres * * having a frontage of two or three miles on the river." (T. II, fol. 282-3.)

Moreover, the notice itself shows what lands are to be irrigated, and the maps show that these lands are in one compact body bordering on the river.

As to the ownership of the United States, we say that the presumption of law is that the Government owns all the lands unless ownership is shown in some one else; and there is no testimony in this case showing ownership in any one else, of any land outside of Buena Vista Swamp.

Plaintiffs also object that the waters of the Calloway will not hereafter be capable of irrigating 70,000 acres of land. On this subject

WALTER JAMES says:

"Approximately, a cubic foot per second would irrigate 100 acres during the irrigating season, a period

“of 60 days. There is a great deal more water required
 “for the first irrigating season than at any subsequent
 “time, the ground being very dry, having no moisture
 “at all for a great depth, and it takes up the water; it
 “is also very full of holes made by gophers, mice and
 “insects; it takes the water up at the first irrigation.
 “The first irrigation makes the land closer, and a por-
 “tion of the water remains some time—a year or two.
 “There is in most places, if not all through that coun-
 “try, a clay subsoil that is very close, at a depth of
 “three to four feet below the surface. It has a ten-
 “dency to hold the water, to prevent it from flowing
 “off and being absorbed by the country below.
 “Being once irrigated it retains the moisture for two
 “or three years. and the following year it does not re-
 “quire so much water. Seventy thousand acres, ap-
 “proximately, can be irrigated from that canal.”
 (T. IV, fols, 281-2-3.)

Notwithstanding their objections to Findings 73 and
 74, plaintiffs seem to recognize that upon the lands irri-
 gated by the Calloway, irrigation is a natural want.
 But whether admitted or not, it is not only a fact of
 which this Court will take judicial notice, but amply
 supported by the evidence—that upon the lands in that
 section of country irrigation is of prime necessity.

Now, the waters diverted by the Calloway have been
 diverted for no other purpose than to irrigate these
 lands and supply this natural want.

PROF. DAVIDSON states that in 1873 he was ap-
 pointed by the President one of the U. S. Commis-
 sioners of Irrigation (T. II, fol. 1471); that “in
 “connection with Gen. Alexander and Col. Mendell,
 “who had been the other two commissioners of irriga-
 “tion, we made an examination of the desert lands * *
 “along the line of the Calloway Canal. That was in
 “November 1877.” (Fols. 1482-3.)

On cross-examination he is requested to read the re-
 port which he made to Messrs. Haggin & Carr of his

examination of these lands in 1877, and as he reads it to specify what facts therein he now, of his own knowledge, knows to be true.

We here insert those portions, and only those which he states to be facts within his knowledge. (*Vide* T. II, fols. 1552 to 1583). Says he (reading from this report):

"The purpose which we had in view was to come to a conclusion in our own minds whether these lands are desert lands in the sense in which the qualifying word is used in the 2d section of the Act of Congress providing for the sale of desert lands in certain States and Territories, approved March 3d, 1877, which says that, "all land, exclusive of timber lands and mineral lands, which will not without irrigation produce some agricultural crop, shall be deemed desert lands within the meaning of this Act." The undersigned, while acting as Commissioners of Irrigation under the Act of Congress, approved March 3, 1873, visited this region in the month of May, 1873. We passed from Tipton to Bakersfield, a distance of about 50 miles, by stage. * * Between Tipton and Bakersfield we passed no houses, except the stage stations, three or four in number, nor were there any evidences of cultivation within the radius of our vision throughout this journey, from Tipton to San Emidio, except in a limited district in the vicinity of Bakersfield, where irrigation was practiced. The country was covered with a scanty crop of wild grass suitable for pasturage. In order to illustrate our opinion at this time, we think it proper to make quotations from our report of the San Joaquin, Tulare and Sacramento Valleys, published in the House of Representatives, Executive Document 290, LXIII Congress, 1st Session.

"When comparing the relative rainfall of the northern part of the great valley with the southwestern extremity thereof in the vicinity of Kern Lake, we said that this latter section is the driest in the whole valley. * * We called attention to the very large area

to be irrigated from the Kern River and the smaller streams, and gave the warning that the water must be economically distributed.

"During May, 1873, we experienced a temperature of 130 degrees in the sun, between Bakersfield and San Emidio Cañon. This great heat, accompanied by excessive dryness of the atmosphere, and months of cloudless sky, evaporates every particle of moisture from the ground, and produces conditions which farmers of the Atlantic States can hardly comprehend. It also demands a larger supply of water for maturing a crop than would be the case if the ground was moist when the proper season of plowing and sowing arrived. Throughout the valley at mid-day, in the middle of summer, the temperature very closely approximates 100 degrees in the shade, and is frequently above that.

"Among the conclusions which we reach will be found the following: "4th. That irrigation is much needed, particularly in the San Joaquin and Tulare Valleys. The production of these valleys would be increased many fold by a comprehensive system of irrigation; the value of irrigable land and of the revenue derived from it, both by State and by the people will be increased many fold in the same ratio.

"21st. That the relation of the United States to the irrigation of California is for the most part indirect, but that in the southern end of the valley between Visalia and Bakersfield and south of this town, it is believed that the United States own many thousand acres of land which are capable of irrigation. That most of this land cannot be cultivated under existing circumstances."

"When we examined the valley for Mr. Haggin, we found that to be so: "That it has no value except for pasturage during part of the year; that if irrigated its value will be increased many fold; that under these circumstances it may be a question whether the United States ought not in some way to encourage the irrigation of these lands."

"The extracts from our report clearly indicate the
 "opinion which we held at that time. A second visit
 "to this locality made us familiar with the changes
 "that had taken place in a little more than four years.
 "* * * Under such canals as were completed we saw
 "fine farms under cultivation and producing large crops
 "of grain and alfalfa. * * Above the canals, and with-
 "in the radius of our examination, we have failed to
 "see a sign of successful cultivation, or indeed an at-
 "tempt at cultivation. The only occupants of the land
 "are the nomadic sheep-herders, who manage to secure
 "a sustenance for their flocks during a part of the year.
 "At present this district above the canals, when not
 "covered with sagebrush, is perfectly bare of vegeta-
 "tion, and it is hardly possible to find a drier landscape
 "than this desolate country presents. We are therefore
 "confirmed in the views which were expressed in our
 "irrigation report, and we feel sure that there is no
 "chance of error in stating that all the land under con-
 "sideration, outside of Kern Island, is perfectly worth-
 "less for the purposes of cultivation without the aid of
 "irrigation. * * The explanation of this want of
 "production in the soil must be sought in the habit-
 "ual dryness of the climate and the absence of fog or
 "clouds to modify the high mean temperature which
 "prevails for most of the year, and evaporates mois-
 "ture with great intensity. Something is doubtless in
 "special instances, particularly in the sandy delta, due
 "to the porosity of the soil, and the absence within
 "reasonable distance of a retentive subsoil. The main
 "difficulty, however, is the want of rain. * * The
 "want of rain is the explanation of the fact that these
 "lands, which have been open for settlement for many
 "years, and which for three or four years have been
 "accessible by rail, remain unsettled and uncultivated,
 "except in places where irrigation is or can be pro-
 "vided.

"We may add, that no part of this land can be called
 "timber land. There is generally a fringe of cotton-
 "wood or willow along the water-courses, but with
 "these exceptions there is no growth of trees.

“Under these statements of facts and circumstances we feel able to say, without any misgiving, that in our opinion the lands in question are desert lands, as desert lands are defined in the Act of March 3d, 1877; that is, they cannot produce an agricultural crop without irrigation.”

In this connection we ask your Honors to look at Taine's picture of “green England”—*post* part 2, p. 27.

JAMES says:

“I know the land irrigated from that Canal. I have been pretty generally over the irrigated portion. There is at present, approximately, 13,000 acres, irrigated this year, in cultivation. I knew that land which is now being irrigated by the Canal prior to the construction of the Canal. There was none cultivated there. This 13,000 acres is plowed, checked, seeded, harrowed and irrigated. It is planted mostly to grain; some alfalfa, some fruit trees and some shade trees; and it is all irrigated. There is no other means of irrigating except from the Calloway Canal.” (Trans. IV., fols. 880-1.) “That land produces very fair crops when properly irrigated—25 or 30 bushels of wheat, 30 or 40 bushels of barley, per acre. * * The production of alfalfa is quite good. It is as great in quantity as any lands in the Island during the period that it is irrigated. Up to this time, there has never been any alfalfa irrigated, except in time of high water, when the water was plentiful in the canal. Fruit trees grow very well.

“Q—What would be the effect on these crops, of whatever sort they may be on these lands, if you ceased putting water upon them?

“A—The crops, or whatever might be growing in that country, *would most certainly perish were it not for irrigation.*” (Fols. 883-4.)

“To the best of my knowledge, all the water that flows in that canal is used on that land.” (Fol. 888.)

MACMURDO says:

“I have never heard of crops being raised out there

“without irrigation. I know what the soil is out there.
 “I know that no crop could be raised out there with-
 “out irrigation. To raise the crops that were raised
 “out there they got the water from the Calloway
 “Canal; all of it.” (T. IV, fol. 1208.)

ROBERTS says that in taking the water into the Calloway Canal they regulated the amount taken by the quantity of water in the river. (T. II, fol. 290.)

All other facts found, relative to the Calloway Canal and defendant's appropriation of the waters of Kern River, seem to be admitted by plaintiffs.

4.

We now turn to the few remaining objections of plaintiffs.

As to the facts stated in Finding 62, the sole objection made by plaintiffs is that it does not appear that any of the canal companies therein mentioned have ever complied with the law under which appropriation of water may be made in the State of California. As this is a question of law and not one of fact, we assume that the plaintiffs will not dispute the facts, so clearly shown by the evidence, that from as early even as 1862 (*vide*: testimony of Sol. Fried, Trans. II, fols. 227 to 229; and of Crocker, fols. 745), it has been customary for all parties so desiring, to appropriate the waters of Kern River; and that since the passage of the Civil Code most, if not all of such appropriations have been made and consummated by the posting and recording of notices, diligent work, etc., the same as in the case of the Calloway. Therefore, if the Calloway appropriation be in accordance with law it follows that all these other appropriations also

comply with the law. We show elsewhere that the Calloway appropriation does comply with the law.

Should testimony be desired as to these other canals and appropriations, see that of James Dixon, T. III, fols. 12 to 20, 32 to 75; H. A. Jastro, T. III, fols. 337 to 375; F. P. May, T. III, fols. 765 to 790; N. M. Brown, T. III, fols. 1129 to 1133; P. O'Hara, T. III, fols. 1156 to 1172, 1183 to 1196; J. R. Watson, T. III, fols. 1261 to 1268; Niederaur, T. III, fols. 1302 to 1310; H. Noble, T. IV, fols. 189, 194; Walter James, T. IV, fols. 888 to 963.

As to the laches of plaintiffs found in Findings 63 and 64, we refer your Honors to subdivision "F," page 144, (part 2) of this Brief.

In support of Findings 68 and 69 that the canals, dams, etc., of the Kern Valley Water Company, were undertaken and prosecuted with plaintiff's knowledge, consent and approval, we refer to the testimony of Crocker himself, Trans. II, fols. 617 to 638; and to that of Wible, Trans. II., fols. 1934 to 1937.

As to that part of Finding 69, which refers to the effect of these canals, levees, etc., we think we have already shown (*ante* "Buena Vista Slough" and "Obstructions at Coles") sufficient to support the finding. We call attention, however, to the testimony of Wible, who, when asked, "What effect has the construction of those canals in preventing the water from running down Buena Vista Slough?" says: "*Well, I take water out and turn it in just as I see proper.*" (Trans. II, fols. 1798-9); On folio 2069 he says that he "*gave the water to Bonestell; didn't sell it to him; just made him a present of it.*"

And to the testimony of McCray, who says that "in point of fact there is a bulkhead of such a character that the water, instead of following its natural course down Buena Vista Slough, has been diverted into the canal; below the levee it no longer flows unobstructed." (Trans. II, fol. 827).

In support of Finding 75, as to Kern River not being a perennial stream, we refer to the testimony of Canfield, who says that during the years 1871, '72, '73 and '74, he crossed the river a great many times when there was no water running in the river at Tracy's Crossing. (T. II, fol. 1211.) And of Wilkenson, who says: "My observation is that whenever crossing the river in the fall part of the year, down at this place, Tracy's Crossing, there was no water, that is, late in the fall. That was my observation. I was in the habit of going down, hunting and fishing, during the years 1873, '74, '75 and '76." (T. III, fol. 323.)

As to the quantity of water which, during the irrigating season of the year, reaches Buena Vista Swamp since the construction of the artificial obstructions at Cole's Crossing and the turning of the water northward from that point, the testimony shows that every year, except possibly the dry year of 1879, plaintiffs, notwithstanding the amount diverted by all the canals along the river, have had not only a sufficiency of water to wet up their lands, and supply their wants, but at times, even, more than they know what to do with. In fact, so much water has come down that the Kern Valley Water Co's Canal—a canal which the Finding says, and plaintiffs do not deny, is 120 feet wide on the bottom, 140 feet wide on the top, and 10 feet deep, with a fall of one foot per mile, having a capacity of carrying more than 1200 cubic feet per second—could not take it all; for, as we have elsewhere shown, Wible, its superintendent, besought the defendant and others to intercept the waters and prevent them ruining his canal. Besides, as we have seen (*ante*, "Buena Vista Slough"), the swamp has each year, since the placing of the dam at Cole's—1879 alone excepted—been covered with water from side to side. And Clarke, speaking of the present condition of the swamp land, is asked:

"Q. Do you consider that land good agricultural land, the most of it?

"A. *Provided it was reclaimed * * The way it is, of course, it is not.*" (Trans. II, fol. 1178).

In fact, all the witnesses of the plaintiff's, including Crocker himself, show that since these obstructions at Cole's Crossing have been built, not only has sufficient water reached the swamp to make their tules grow, and to supply all wants and actual uses, but that when it has come at all it mostly came in such quantity as to be a nuisance.

The fact found in Finding 78, that the ridge therein mentioned extends across the slough at a point north of the mouth of New River, is conclusively shown by the fact that in their natural flow and at ordinary stages the waters of New River, after reaching the slough, turn southward towards the lakes. Besides, as we have already seen (*ante*, page 85), Crocker himself says that there is an obstruction there which prevents the water flowing north.

As to the facts found in Finding 80, we say that there is no proof in the case to justify a different finding upon the matters therein mentioned, for: Prior to their acquisition of title, plaintiffs show no possession or use of the land differing at all from that of the general public. (*Vide ante* "Plaintiffs' Title" and "Plaintiffs' Possession"). So all presumptions are against them. But subsequent to their acquisition of title, not only do plaintiffs show an actual possession and cultivation of the small tract mentioned, but the presumptions of possession and use follow their legal title.

In support of Finding 16, as we have already seen by the testimony of Crocker (*ante* page 138), the flood of 1867-8, in opening up the channel of New River, carried down large quantities of earth, sand and other matter, and deposited the same in and near Buena Vista Slough, north of Buena Vista Lake and south of Buena Vista Swamp, and thereby filled up the slough at that point, and of necessity enlarged the surface area and holding capacity of the lakes. We have also seen from the testimony of Mendell, Schuyler, James and others,

that the waters of Kern River carry a large quantity of sand, etc., which it deposits about the point where the river enters the slough, but, necessarily north of that point, for the river in its natural condition still continues to flow south. Now, as this deposit, this building up, has been going on year by year, in but a short time, were it not for the artificial obstructions at Cole's, the river itself would have constructed such a barrier at that point in the slough that further overflows of the lakes towards plaintiffs' lands would have been rendered impossible.

It is also a necessary conclusion, from the fact that New River flows southward from the point where it enters the slough, that before overflowing towards plaintiffs' lands these lakes must extend so far northward as to embrace within their limits the point where the river enters the slough.

In answer to plaintiffs' objection to Finding 37, we say: If your Honors will but read the finding as it is written, and not as counsel try to construe it, you will find that the greater portion of the finding is taken from plaintiffs' own pleadings, and that the balance of it is an inevitable deduction from the whole testimony in the case; for, though there may always be snow in the mountains, it is not and has not been *usual* or accustomed for it to so accumulate as to produce the floods therein described.

In support of Finding 38, we refer specially to the testimony of Schuyler (Trans. III, fols. 1113-14) and of Macmurdo (Trans. IV, fol. 1214), who both state that willows and other trees, etc., grow in the bed of the river the same above the heads of all the ditches as they do below the ditches; and to the testimony of Wible (Trans. II, fols. 2026 to 2044), who states that the growth of willows and other trees in the channel of the river is attributable, not to *the taking out* of the water, but to *the putting in* of brush and stakes.

In answer to plaintiffs' objection to Finding 40 we

to refer your Honors to Maps H and I, which show the high water mark of May or June 1877 (the last time the lakes were full, for Wible's dam at Cole's prevented them from ever filling again), though even at that time they were not full to overflowing, for, Fillebrown says that when he made his survey in 1877, *the water was still running into Buena Vista Lake* (T. III, fol. 967)—therefore it could not have been running out.

MACMURDO says:

“ While I did not myself run the line which is marked as high water on Map H, I fixed points enough on it to establish the line on the map as it is there, correctly. * * The high water mark on Map I, painted in green, in Section 31 (? 13), T. 31, R. 25, and portions of it extended through Sections 4, 9, 10, 15 and 14, of that Township, is correct, substantially correct. They are the same on Maps H and I as far as the different scales will permit. (T. IV, fols. 1359-60.)

FILLEBROWN says that the high water mark is delineated on Map I by the light black line shaded with green. (T. III, fols. 951-2.)

This line on Map I shows that the two lakes, Kern and Buena Vista, from one sheet of water; and as the water was still running *into* the lakes at the time that certain portions of the line were established, the lakes extend, at least to this line before overflowing northward towards plaintiffs' lands.

See also testimony of—

S. W. Wible, who says, that in October, 1874, he went to Buena Vista Lake—between the lakes (fol. 1915)—near where Old River enters the swamp (fol. 1858); that at that time he only went to the margin of the *swamp land*; that *the water was all through the tules there*; that the water might have been higher, or might have been lower than the dark line on Map 4 marked on the border of Buena Vista Lake, the end of the shading—*i. e.*, the segregating line of the swamp and overflowed land. (T. II, fols. 1858 to 1862.)

Now, when Wible found this water spread out to the margin of the swamp land—to the segregating line of the swamp and overflowed land—it constituted (as your Honors will see from a glance at the map) Kern and Buena Vista Lakes one sheet of water; and as this swamp or segregating line is within the water line established in 1877 (*vide* map H) the water was not overflowing or running out of Buena Vista Lake at that time; for, as we have seen, the water must rise beyond the line of 1877 before the lakes could overflow northward along the slough.

See also testimony of Walter James (folios 148 and 149 to 153), which shows that in 1872, and '73 the water line of the lakes extended out even further than that shown on Map I by Fillebrown.

If further testimony be needed see:

Wilkinson, Trans. III, fols. 306 to 310;

Fillebrown, Trans. III, fols. 994 to 998;

Souther, Trans. III, fols. 696 to 703;

Stockton, Trans. III, fols. 813 to 828;

Stoner, Trans. III, fol. 836;

Hoke, Trans. III, fols. 860 to 865;

Connor, Trans. III, fols. 917 to 924;

Brown, Trans. III, fols. 1138 to 1143;

Colton, Trans. IV, fols. 122 to 128.

In support of Findings 33 and 34, we say: There is no evidence in the case showing that plaintiffs paid any sums of money for their lands, nor any evidence whatever to justify a different finding on the matters therein mentioned.

Crocker says that *personally* he had nothing to do with constructing the Kern Valley Water Company's Canal, but, so far as the corporation is concerned, he *thinks* he purchased supplies for the building of it and *presumes* that he paid a part of the expense for building it. (T. II, fol. 618.) Wible, however, who was superintendent of the Canal and other works, and as such drew for all moneys and made all disbursements, contradicts Crocker, and says: "I don't think Mr. Crocker

"bought any of the supplies for me for that work; I don't know of his buying any supplies for the construction of that dam. I don't know of his paying out anything on the construction of it or on account of it. For all the work and labor that was done and supplies, I gave orders on the Secretary. I did not know that Mr. Crocker had anything to do with it. He didn't draw bills or settle accounts."

"Q. Did you consult with him about doing that work—how it was to be done, whether it should be done, etc.?"

"A. No, sir. I was put there to do that work, and I was hired by Mr. Livermore, and made all the arrangements with him." (T. II, fols. 1934 to 1937.)

But, even were it admitted that plaintiffs constructed the Kern Valley Water Co.'s Canal, it was not constructed for the purpose of controlling, regulating or utilizing any waters *naturally* flowing to the swamp; for, as we have already seen, there was no natural flow in that direction—unless the spasmodic overflows heretofore described could be so termed—but was constructed for the purpose of reclaiming the lands around Buena Vista Lake (*vide ante*, pp. 80 to 82), and of *appropriating* and turning northward towards the swamp the waters which flow to the lakes.

However, be the facts as they may, plaintiffs' inducements to purchase, amounts of purchase moneys, expenditures, etc., are matters utterly immaterial to the issues involved.

“ASSIGNMENTS OF ERROR.”

The first assignment of error in Appellants' "Points and Authorities," p. 3, merely involves the general question of Riparian Rights in this State, which we notice *infra*. So, with regard to that on p. 6.

As to that on pp. 7 to 13, the same remark applies. The matter objected to was also pertinent in equity as bearing on the question of laches—which we also discuss below—remedy at law, etc.: and if it did not constitute a defense, and should have been stricken out, it was not an assignable or reversible error, because the other points involved are decisive of the case, and the findings and decision thereon could by no possibility be effected by those rulings.

As to that part on pages 13 to 17, "Points and Authorities of Appellant," the same observations apply. It is apparent that the facts pleaded should be before a Court of Equity, in order to a full understanding and proper disposition of the case. Besides a good defense is there pleaded. If others had a valid right to the water, the plaintiffs could not sue for a deprivation of it. The case would be no stronger if we had pleaded that that much of the water, in its natural flow, went in another direction, and never could have reached plaintiffs' lands; and if the surplus, to which alone they could make any pretense of claim, would not have reached the lands of plaintiffs if left to its natural flow, they cannot complain of its diversion. Moreover, the plaintiffs themselves first introduced as an element in the case by their evidence, in opening this question of the other canals and water rights.

The part on pp. 17 to 20 of "Appellant's Points and Authorities" falls under the same head, and in addition, sets up a good defense, if proven, to wit, a license from those entitled. If not proven, it cannot affect the result properly reached on other and independent defenses.

The part on pp. 22 to 24 bears on the general equity of the bill, and the refusal to strike it out is also immaterial in view of the findings and decision. If no testimony was introduced in its support, the appellants could not be prejudiced by its retention. For the same reason it matters not whether there were any findings thereon.

To the point (p. 32 Pts. and Au.) as to sustaining objection to question asked Tracy, (Trans. II., fols. 1027-8), it is answered that the question was leading, was not re-examination, and was improper as calling for a mere opinion, and an opinion on an irrelevant matter. They might as well have asked him if he could have drank it all up in a year.

The question asked Jewett (Pts. and Au., p. 32) was proper. On direct examination they had questioned the witness about Baker's building the dam in A. D. 1865. (Trans. II, fol. 1222 *et seq.*) They had attempted to deraign title through Baker by deed dated A. D. 1870. (Trans., II, fols. 3 and 77). What their grantor, Baker, theretofore said on this very subject was therefore proper. But in view of the other testimony, and as there was no dispute about these facts, and as they did not and could not affect the controlling findings, it could not be reversible error.

As to the report of Davidson (Pts. and Au., p. 33), it was admissible on cross-examination; but that question need not be determined for (T. II, f. 1547) we offered to, and requested the Court to strike it out, and the motion was denied at the request of appellants. It is needless to cite authorities, as they are all one way, that when on trial before the Court, evidence has been improperly admitted, it may be withdrawn—the Court may even strike it out on its own motion.

It may be that a party, after having introduced evidence and finding that it bears against instead of for him, had not the right to withdraw the evidence against the objection of the other party; but we believe it never was pretended that if the party offering the evidence offers to withdraw it, and the opposite party ob-

jects to the withdrawal and insists upon its retention, he can afterwards assign the admission of the evidence as error.

As to the photographs (Pts. and Au., p. 33), they were admitted so far as proper. They should not have been received to show measurements, because the evidence showed, that on account of the perspective, they were not reliable for that purpose, involving nice mathematical calculations to reach a result which could be attained by better evidence—to wit, actual measurement. And, in fact, the actual measurements were put in whenever desired. Besides, it was immaterial as to the exact measurements at these points. Moreover, there is no testimony in the record showing how measurements could be made from these photographs, or even that it was possible to make them. Watkins testified that he himself could not make the measurements, and did not know that any one else could, but merely supposed it might be done. (T. II, fols. 2311-12.)

The objection (Pts. and Au., page 33), to the question to Crocker as to his authority, was properly overruled. The witness had already given the same testimony without objection (T. II, fol. 2362). Also it was admissible on cross-examination to show the relations between the parties, and to sustain the evidence of acquiescence. In no event could the answer have prejudiced the appellants. As to the power of attorney itself, the further objection is made that it was not proven. But (T. II, fol. 2368) it was duly acknowledged, and so was good at least as to one of the plaintiffs.

The objection (Pts. and Au., p. 34), to striking out portions of Crocker's testimony, is answered by a reading of the transcript (Trans. II, fol. 2383; Trans. III, fol. 130, *et seq.*; Trans. II, fol. 2379). Plaintiffs asked leave to put a single question to show how long Crocker was in possession. The question was asked (fol. 2383), and the answer, so far as it went beyond the question and the permission, was properly stricken out, both as not responsive and as giving, not a fact, but the opinion of the witness on questions of law.

As to the objections to the notices of appropriation introduced by us, none of them could in any way affect the result except that of the Calloway. But they are all without foundation. We did prove the loss of the originals where they were not produced by the usual evidence in such cases.

Vide *Dunning vs. Rankin*, 19 Cal., 640.

It was not necessary to prove the signatures to the originals. It was not even necessary that they should be signed at all. C. C., §1415.

We did prove the posting. The notices did not need to be acknowledged; and as to the affidavit in the Calloway notice, it was admissible as it was received as part of the record, not as proof of what it purported to be. The record, under the Code, is admissible itself, independently of the original, to prove compliance with the law. As far as the Calloway notice is concerned, no question of secondary evidence can arise, because, as a matter of fact, we introduce the original notice itself.

Again, there is no presumption that the notice was ever in defendant's possession, and therefore no necessity for accounting for its loss. However, on this subject there is proof of the loss of the original. Anderson says that he saw *what was left of it*, a year afterwards (T. III, fol. 1738); and McFarland says that it was destroyed the same as any other paper that was posted up, by the elements (T. IV, fol. 15).

The copy offered the witness was not for the purpose of establishing the contents of the notice; but being the record itself (Trans. III., fols. 63 to 68), was merely for the purpose of showing that the notice recorded was the same as the notice posted. It was not necessary that the notice should have been signed by any one. The law did not require it. A mere printed statement that "John Smith claimed," etc., without any signature whatever, would have been a sufficient compliance with the law. For the same reasons as it was unnecessary to sign, it was also unnecessary to ac-

knowledge. The law did not require acknowledgment though it made express provision for recording. It was not necessary to account for the original notice: the law directed that it should be posted and that a copy should be recorded; from which, it is evident, that the law intended that the original should remain posted. Common sense will tell one that the action of the elements, would soon destroy a notice of this sort. The authorities cited by appellants as to acknowledgements all refer to conveyances or instruments intended to bind the persons *executing them*. It never has been held that the grantee, the person in whose favor the instrument is made, should acknowledge it. In the case of the notice, the appropriator is but the grantee of the State. The act authorizing the appropriation coupled with the notice posted, evidenced the grant made by the State; and there is no rule of law requiring the grantee to acknowledge, nor is there any requiring acknowledgement by the State as grantor. Besides, plaintiffs not being appropriators, are not entitled to exact that these provisions of the Code should have been complied with; for the plaintiffs, if owners of riparian rights, are in no manner affected by these provisions of the Code—provisions which are merely directory to the appropriators, and intended to fix their relative priority—and if not such owners, then a compliance or non-compliance was a matter of utter indifference to them. To apply the provisions cited by counsel as to the acknowledgements of deeds to notices of this kind would simply be to destroy every appropriation ever made, whether of mines or of water.

As to appellants' 17th point, on page 50 of appellants' Points and Authorities, the question is really the same as that raised by the motion to strike out. Because, under the general allegations of the answer, it was as proper to prove the appropriation of the canals not specified, as of those specified. The general allegations were sufficient to admit the proof; and if they were not sufficient and specific, the remedy was by mo-

tion to make the pleadings more definite and specific. If the testimony was not admitted the error was immaterial; but we think it was admissible in this case like the other testimony, in order to put the Court of Chancery in possession of all the facts and circumstances surrounding the case. It tended to show a prescriptive right, and therefore went to that extent in direct denial of the claim set up by the plaintiffs. It also bore on the question of laches and acquiescence; and met, or tended to meet, the plaintiffs' case as to the effect of the appropriation of the Calloway in drying up the lands of the plaintiffs.

We had a right to prove the amount of land irrigated as bearing on the right to equitable as distinguished from legal relief; and if we had not, it would not affect the findings and decisions on the merits. Besides defendant had pleaded a general custom, and that there were many canals taking out water for irrigation and other useful purposes. By showing the amount of land irrigated defendant introduced proof tending to establish the custom pleaded, and at the same time showed the beneficial use to which the water was put. We have cited authorities showing that on the question of reasonable use the custom of the country is admissible among other things, and also that it is admissible to prove "all the other and ever varying circumstances of each particular case," and also "any *local* customs along the stream." The testimony also tended to show the propriety and necessity of the use, and therefore bore directly upon this branch of the case.

As to the plaintiffs' point, on page 56, concerning the testimony of Brower, it was properly rejected. It could make no possible difference what amount of stock in the several canal companies was owned by Haggin & Carr. We think this point is too plain for argument.

The question asked the witness McLean (Appellants' Pts. and Au., p. 56), was admissible in contradiction of Wible, and the proper foundation was laid. The whole tenor of Wible's testimony was that the canals were injuring the slough, and it was proper to contra-

dict him by showing that his own actions conflicted with his evidence. Besides, Wible's connection with plaintiffs was such as to render it proper to impeach his good faith and sincerity, and when they introduced him to show damage to their land, and he endeavored to make out for them that they were suffering for water, we had a right to show, by his own acts and admissions, that the contrary was the fact.

See Trans. IV, fols. 1526 to 1530, for the foundation laid for contradicting Wible by McLean.

But the testimony was admissible as independent evidence as directly proving acquiescence and laches. On the oral argument, Mr. McAllister stated, in substance, that the canal of which Wible was superintendent was the canal of these plaintiffs. There is abundant testimony in the record, tending to show that Wible was in fact the agent of the plaintiffs; and that Wible was the superintendent of the Canal and Reclamation Works. It follows that this testimony of McLean was directly pertinent, and in fact controlling, in support of the Findings of laches and acquiescence, because, in effect, it shows that the plaintiffs here actively participated in the diversion of the water above, and wished it to be done. Also (T., II, pages 526 and 527), the foundation was laid for asking Carr what Wible had done in regard to active participation in the diversion by the Calloway, and (T., IV, pages 415 and 416), Carr testified that Wible not only requested diversion through Goose Lake, but asked him to turn as much water as he could into the Calloway; and (fol. 1659), that the request was made for the purpose of protecting these very works below, in which the plaintiffs were interested, and as to which Wible was acting for them.

As to the appropriation by the defendant, objected to by plaintiffs on page 57, we show below that such appropriations of water may be made within this State.

As to the purpose of offering the notice of appropriation, it was both to show a compliance with the law, and to relate back to the date of posting, so

as to fix the time that the grant of the water right was made by the State to the defendant.

The affidavit of Calloway attached to the notice of appropriation, was not offered, as itself establishing any facts, but was an inseparable part of the notice itself, and the notice could not be read without reading the affidavit.

As to the cost of construction of defendant's canal, on page 58, the evidence was admissible as bearing upon the right to equitable, as distinguished from legal relief. It also tended to prove diligence in prosecuting the work by showing its magnitude.

As to James' testimony relative to the cost of the canal, whilst it may be true that his testimony itself was given on Friday, May 20, 1881, his estimate of the cost had no special reference to that day. His estimate was merely an approximation of what the cost of such a canal would be; and as the testimony of other witnesses showed that the main canal was substantially the same prior to May 1, 1879, as it was at the date of the trial of the suit, his estimate was equally applicable to the cost of the canal up to May 1, 1879, as it was to the day upon which he testified.

As to the production of crops on the lands irrigated by defendants, defendant had claimed that its appropriation was for a beneficial use, to supply a natural want; that irrigation was absolutely necessary upon the lands irrigated by defendant; and to support these claims it was proper to show the production of crops on the land and the effect upon such crops if the water should be stopped. The testimony was also proper as bearing upon the question whether equitable relief was proper, and the distinction shown in the authorities cited by us as to interfering with large works where the balance of inconvenience is against equitable interposition, and generally as bearing upon the question of laches and acquiescence.

If there was any error in admitting the report of Wilkenson and McFarland, it was cured by its withdrawal before the witness left the stand.

The record shows affirmatively that the report was not considered by the Court. (T. III, fol. 342.)

As to the testimony of Mendell and Schuyler to amount of evaporation, it was properly admitted. They testified, in effect, that from their knowledge and experience they could give the amount with sufficient certainty without the data objected to. But the only data really used were those taken at Visalia and Sumner, and they testified that the distance they were taken from Bakersfield would not vary the result to appellants' injury—could not make their calculations too high.

See T. III, fols. 995, 1022-1025, 1038, 1038-1056, 1042, 1058, *et seq.*, 1060, 1063, 1075, 1079, 1080, 1082, 1091; p. 275, fols. 1100, 1101, 1103-1105, 1373 *et seq.*, 1517 *et seq.*, 1564, 1566, 1571, 1573, 1581, 1583, 1707—that the records from Visalia were official and therefore *prima facie* evidence. See Rev. Stat. U. S., p. 35, and evidence of Mendell *supra*.

The Visalia records were properly admitted. These records were required to be kept by the Government, and were themselves the official records of the Government office. (Revised Statutes U. S., p. 35.) Even those which were not taken by Cochran were taken in the due course of official business, under sanction of the Government and by his authorized assistant. As a matter of fact, however, they were substantially all taken by the witness himself. But even if these Visalia records and the records taken by Sampson and the computations of Schuyler and Mendell based thereon, were improperly admitted, or having been admitted, were improperly retained on the motion to strike out, such rulings of the Court do not constitute reversible errors; for, first it does not appear that the Court based any conclusions upon such evidence. Second, such evidence was but cumulative of the testimony of other witnesses who had stated that the waters all went to Kern and Buena Vista Lakes; and third, was but corroborative of the testimony of Souther that "usually there is a large amount of evaporation over so much territory as these lakes cover; the evaporation is very

great." (Trans. III, fol. 666.) And of James, who says that in the year 1875 from observations he made, he found that the average loss throughout the year from evaporation and shrinkage was from five to five and a half vertical feet. (Trans., III, fol. 228.) So, had the Visalia and Sampson records, and the Schuyler and Mendell calculations thereon not been admitted, we would have still had the uncontradicted testimony of Souther that evaporation is very great, and of James that it amounts to from five to five and a half feet.

Fol. 1100, Trans., III, Col. Mendell says that, assuming the correctness of the Visalia data and those on Kern Lake, he was satisfied that that was enough to enable him to arrive at his conclusion as to the amount of evaporation, and he thought the conclusion was correct. Fol. 1101 he says: "Didn't take into consideration records at Sumner nor the records kept by Crusoe at Bellevue." Fol. 1103 to 1105: "I am satisfied by my own experience and knowledge that the calculation is not too large by reason of taking the Visalia data. It is dryer here than there," etc.

Fol. 1373 *et seq.*, Cochrane testifies that he is U. S. Signal Observer; has his office by enlistment in the employ of the U. S. Government under the laws, and it is his duty to make a record of his observations; that they were taken in Visalia about 80 miles from here. "Some taken by an assistant whom I was authorized to employ and did employ. By instructions and rule of office kept duplicate and sent original on to Washington. I take this from the original record book."

Mendell's evidence shows that the fact that they were taken 80 miles from this place would not make the calculation of evaporation too high. It was objected to as not being an original, but it was itself a record.

As to the plaintiffs' objection on page 62, to the question asked Reading: we say the question was proper. Both Reading and Schuyler had sufficiently explored the swamp to be able to state whether or not there was a continuous channel. Besides the question was not upon the ultimate fact to be found by the Court,

whether or not there was a water-course through plaintiffs' lands. For even had these witnesses stated that there was a continuous channel through the swamp, such fact alone would not have proved a water-course, for it had no bearing whatever upon the question whether or not water usually flowed; and clearly it is not necessary that a witness should have traced the whole channel in order to testify whether or not it was continuous. It was enough for him to have examined it sufficiently to show that at a certain point it did not exist. That would be proof that it was not continuous. The only possible objection to the question would have been to its form, and that was in the discretion of the Court.

As to the point on page 62, concerning the quality of the land along the slough, Reading showed its fitness to answer the question. (Trans., IV, pp. 647 to 656). Plaintiffs' own witness Wible, testifying as to the quality of the land, says:

"I can tell by simply looking at that land, without making any close examination of it, whether it contains so much alkali as to be unfit for cultivation.

"Q. Just by walking over it and looking at it?

"A. Yes, sir." (Trans., II, fol. 2121).

The admission of the deed to Haggin assigned as error (Appellants' Points and Authorities, p. 63), was immaterial if an error at all. The finding of the Court was with the plaintiffs on the point.

The evidence of Carr, objected to (Appellants' Pts. and Au., p. 63), was admissible to contradict Wible, the proper foundation having been laid.

Mr. Wible had testified for the plaintiffs in reference to building the canal he superintended, and that it was used to turn the water on to plaintiff's lands for irrigation, etc. He had testified as to the effect of the Calloway and other canals in filling up and destroying the channels below. He had testified (T. II, f. 1815), as to the flow in the swamp and sloughs in 1878, and the effect of his testimony was that, by reason of the Calloway Canal, etc., there was a scarcity of water be-

low and in the canal he superintended. To countervail the impression this testimony was intended to convey, it was proper to ask him if he had not acted in 1878 as he would not have done if such were the facts. Accordingly (T. II, fols. 2099 *et seq.*), the proper foundation was laid by asking him if at a certain place (2103), in 1878, he did not request Carr to take the water off, and to contradict him if he denied it. The testimony was also admissible for other reasons. The testimony of Carr as to his conversation with Calloway was plain *res gestae*. It had been shown that Calloway was constructing a canal, and it was proper to show that the work Calloway was doing was for and as the agent of the corporation defendant.

In relation to the title of the appellants, the Montgomery Grant was a grant on condition precedent, *Montgomery vs. Karson*, 16 Cal., 94, and by statute of 1878, expressly declared that the title by judgment should vest "as of the date of the judgment." The judgment in favor of Miller and Lux and Crocker is of date A. D. 1878.

As to the claim that without the certificate of purchase the title by patent relates back ten months before the date of the patent, it is disposed of by the case of *Osgood vs. El Dorado Company*, and even without the aid of the principles there applied, is untenable.

As to the rejection of the proof of lands irrigated, by the records made by Dixon, it affirmatively appears that it was hearsay. This record was not at all like that at Visalia. There the party making the observation—knowing the fact—made the record. Besides, taking the excluded evidence into consideration, and according to it absolute verity, would not vary the result in any view of the case; and this, we think, may fairly be said of most of the errors assigned—of all except those we have fully noticed.

We have endeavored to notice all the points and authorities served on us, but as the Points and Authorities are so bulky that we may not have sufficiently noticed all of them, we beg not to be considered as admitting the validity of any of them.

Argument and Authorities.

Argument and authorities.

ARGUMENT AND AUTHORITIES.

A.

This case is ruled by, and the judgment below must be affirmed upon the authority of *Osgood vs. The El Dorado Company*, 56 Cal., 574.

The complaint alleges not only that the plaintiffs' title accrued as late as 1876, but expressly shows that it could not have accrued sooner, because it is averred in terms that until after that time the title to the lands, and all the lands now claimed by the plaintiffs, was in the State of California.

The complaint also alleges an appropriation and diversion of the water on the part of the defendants in the year 1876.

The finding of the Court, which is sustained by all the testimony bearing on that subject, is, that in strict compliance with law and custom, the Calloway appropriation was commenced in the year 1875, before the plaintiffs had any right, title or interest whatsoever in the lands they now claim and a diversion of water from which, they now seek to enjoin.

Assuming, then, that the case of *Osgood vs. The El Dorado Company* correctly declares the law on this subject, it will be sought to take this case out of the operation of that decision, we apprehend, only upon the following distinctions and propositions:

First—It will be contended that the lands in reference to which riparian rights were claimed in the *Osgood* case were public lands of the United States, and plaintiffs' title thereto came from a pre-emption right, and was evidenced by a pre-emption patent; while in this case the lands in connection with which riparian rights are claimed, were a part of the swamp and overflowed land granted to the State by the General Government in September, 1850, and the title of the plaintiffs thereto comes, not through the pre-emption patent directly from the Federal Government, but through a

patent issued by the State upon a purchase from the State of a portion of this swamp and overflowed land. But this is a distinction which can make no difference in the application of the principles underlying the Osgood case.

If, then, these lands in question belonged to the State at the time of the appropriation of the Calloway by the defendants and their grantors, that appropriation gives a right as against a subsequent purchaser of the swamp land from the State upon exactly the same principles, and for exactly the same reasons that the appropriation in the Osgood case gave a right as against a subsequent patentee from the United States Government.

Second—It may also be contended that though the decisions show this to have been the law prior to the Code, yet, that by reason of the Code, and by the insertion therein of the saving of riparian rights, a change was wrought in the law of California upon this subject. But this cannot be so; among other reasons, because the Code was, and professed to be, an expression of the then existing law; and because to give it the construction contended for by the appellant would be simply to make nonsense of the greater portion of the Code devoted to this subject; would be to declare that a statute passed for the avowed purpose of giving and regulating the right of appropriating waters, denied from and after its passage the possibility of making any such appropriation.

The very statute creating the Code Commission shows that such a radical change would have been entirely without the scope of the authority intended to be conferred. It says, the Commission is created for the purpose of revising and compiling the statutes of this State, and it empowers the Commissioners to "revise all of the statutes of this State, * * * correct verbal errors and omissions, and suggest such improvements as will introduce precision and clearness into the wording of the statutes; and, by a supplemental report thereto, to designate Acts to be repealed, and to prepare substitutes and recommend such enactments as they may deem necessary to supply the defects of and give completeness to the existing legislation of the State; * * * and to arrange the statutes in the most systematic and convenient form."

By Section 5 of the Civil Code it is enacted that "the provisions of this Code, so far as they are substantially the same as existing statutes or the common law, must be construed as continuations thereof, and not as new enactments."

Our Code is modeled upon, we might say almost bodily taken from, that of New York. The authority of the New York Commissioners, indeed, was broader, extended to a revision of the whole body of the law, and was not confined to the statutory law. In New York the authority was given them by their Constitution; yet, they say in their introduction, showing their notion of its scope: "The more perfect a digest becomes the more nearly it approaches the Code contemplated by the Constitution." And in speaking of their Civil Code they say: "All that it professes is to give the general rules upon the subjects to which it relates, which are now known and recognized, so far as they ought to be retained, with such amendments as seem best to be made, and saving always such of the rules as may have been overlooked. In cases where the law is not declared by the Code, it is to be hoped that analogies may nevertheless be discovered which will enable the Courts to decide."

Austin, in his Jurisprudence, Vol. 2, page 118, says: "In like manner, codification does not involve any innovation on the matter of the existing law. To imagine the contrary is a mistake often made by the opponents of codification. They often suppose codification to mean an entire change of all the law obtaining in the country."

Now, every word in the portion of our Code referring to appropriation and riparian rights can be given its full effect without imputing any intention, in any manner, to change or alter the pre-existing law, in so far as any question arising in this case is concerned. The doctrine of the right of prior appropriation and diversion of water from water-courses on all of the public land, both of the state and of the nation, had been, as the decisions show, recognized as the law of California ever since the organization of the State in 1850, and previous thereto. Under and in reliance upon that doctrine, rights of immense value have vested, and it is not to be believed for one moment that it was the intention of the Legislature, in adopting the Code, to reverse the policy of the State from the organization of the State, and entirely abrogate those rules which had grown up in the State of California, and which were necessitated by the wants of the people.

If, then, the doctrine of *Osgood vs. The El Dorado*

Company applies equally to the case of a subsequent acquisition of title to State lands or swamp and overflowed lands, it seems to us the finding of our prior appropriation is necessarily conclusive, and entitles us to the affirmance of the judgment regardless of all other questions which arise upon the record, unless this Court be of the opinion that an error was committed by the Court below in refusing to allow the plaintiffs to introduce, as rebutting evidence, the certificates of purchase, offered to carry their title back by relation so as to antedate the appropriation of the defendant. Because the other assignments of error, even if well founded, can none of them affect the decision of this question; and this question, thus decided, is necessarily decisive of the whole case.

We contend that the ruling of the Court below in excluding the certificates of purchase was correct, and that the testimony offered was not rebutting testimony. The plaintiffs in their opening, did not confine themselves to proving their legal title by the introduction of the patents issued in 1876 and later. They did not rest their case upon that proof of strict legal title. But, in the opening of the case, they endeavored to prove a right antedating our appropriation by showing that prior to our appropriation they and their grantors had had the actual possession of the premises through which the water course is claimed by them to have immemorially flowed.

They introduced witness after witness in the attempt to prove a possession many years antedating our appropriation; that is, they anticipated our case, of which case they were well apprised, not only by our pleading, but by their own complaint, and endeavored to overthrow it by proof of a prior riparian right in themselves.

The failure to offer the certificates of purchase in their opening case and before they rested was no oversight, but was clearly the result of a deliberate purpose; the reason being evidently that the certificates of purchase, or the establishing of riparian rights as appurtenant to the land covered by the certificates of purchase, would not, even if admitted and held valid, have established the right which they wished to maintain. Even on their own theory as to the existence and locality of the water course through the swamp, if they were confined to the lands covered by the certificates of purchase, they could not have made out such a riparian right to the water, or that they were riparian pro-

prietors to such an extent on the water course as would have justified the decree they sought.

The question then on the assignment of error in rejecting these certificates when offered in rebuttal, is simply this; whether the plaintiffs, upon whom lie the burden of proof to establish the alleged title, can rest their case by introducing a portion of their evidence tending to establish their title, and then, after the defendant has introduced his proof in denial of the title, mend their case by afterwards introducing other proof simply cumulative of the case attempted to be made in the opening.

Having assumed in the opening the burden of showing, and having attempted to show, not only their title from and after the date of their patents, but a right antedating the patents and antedating our appropriation, upon every principle they were compelled to exhaust all their proof upon that subject in their opening, and could not afterwards introduce it as rebutting testimony.

"That is not rebutting testimony which mainly supports the case stated in the complaint, and only incidentally goes to explain or repel the evidence in behalf of the defense."

Smith vs. Richardson, 2 Utah, 424.

In *Marshall vs. Davies*, the Court say: "Having rested his case, and the plaintiff having closed his testimony, the defendant had no legal right to re-open his own case and introduce evidence to sustain his defense, which he might have introduced when the case was with him. No rule for the conduct of trials is more familiar than that the party holding the affirmative is bound to introduce all of the evidence on his side before he closes. (*Hastings vs. Palmer*, 20 Wend., 225.) He must exhaust all of his testimony in support of the issue on his side, before the testimony on the opposite side has been heard. (*Ford vs. Niles*, 1 Hill, 301; *Rex vs. Stimpson*, 2 Carr. & P. 415.) He can afterwards introduce evidence in rebuttal only. Rebutting evidence in such cases means, not merely evidence which contradicts the witnesses on the opposite side and corroborates those of the party who began, but evidence in denial of some affirmative fact which the answering party has endeavored to prove. (*Silverman vs. Foreman*, 3 E. D. Smith, 322; 2 Carr. & P., 416.) In the

“ present case, after having testified to one conversa-
 “ tion, which was denied on the other side, the defend-
 “ ant was not entitled as matter of right to prove
 “ another as to which he had not previously testified,
 “ even though it tended to support his original state-
 “ ment. This was not evidence in rebuttal. The testi-
 “ mony on the part of the plaintiff was, that other con-
 “ versations might have been had, but that no conversa-
 “ tion of the nature testified to by the defendant ever
 “ took place. This was a mere denial, and not proof of
 “ any affirmative fact which the defendant had the right
 “ to rebut. These rules may in special cases be de-
 “ parted from in the discretion of the trial judge, but a
 “ refusal to depart from them is no ground of excep-
 “ tion.” In this case it was conceded the defendant
 had the affirmative of the issue in the question.

Marshall vs. Davies, 78 N. Y., 419.

S. P: *McHugh vs. Butler*, 39 Mich., 185.

“ Having elected to anticipate the defendant’s case
 “ at the opening, and to rebut it in advance, the plain-
 “ tiff should have introduced all of his evidence upon
 “ that head *then*. Having adopted that course, further
 “ evidence of the same character could not be consid-
 “ ered as rebutting, but merely as cumulative, and in
 “ its discretion the Court might well decline to receive
 “ it at the time it was offered.”

Casey vs. Leroy, 38 Cal., 699.

Where it was a necessary part of the plaintiff’s case
 for him to prove that he did *not* ship a lead bar, he
 rested without evidence on that point. The defendant
 gave evidence that he *did* ship a lead bar, and plaintiff
 offered to show in rebuttal that about the time in ques-
 tion he *did* ship a gold bar. Held, properly excluded.

The Court said *there was no showing of mistake or
 inadvertence, nor appeal to the discretion of the Court*
 on reasonable cause shown; and that “It was testi-
 “ mony that clearly belonged to the original case of the
 “ plaintiff, and should have been introduced before he
 “ rested; for if it tended to prove anything material, it
 “ was that Kohler did *not* deposit a lead bar. A plain-
 “ tiff has no right to keep back all his testimony, on
 “ any material point, until he draws out the testimony
 “ of the other party, and then come in with his own.
 “ This would give him an undue advantage contrary to
 “ the rules of law; and if he does so reserve his testi-
 “ mony deliberately and wilfully, the Courts will not

"allow him to come in after the defendant rests and make out his case. But whether the plaintiff will be permitted to reopen his proofs or not is a question which rests very much in the discretion of the Court below." It was not testimony in rebuttal.

Kohler vs. Wells, Fargo & Co., 26 Cal., 613.

Trespass. Plea, justification as Surveyor of Highway.

Plaintiff, in opening, gave evidence of the hostility of the defendant to him, and that the trespass was malicious. Defendant then supported his plea by evidence, and plaintiff offered to show in rebuttal that defendant committed the act, not in the discharge of his official duty, but from malice and hostility towards, and design to injure plaintiff. Rejected.

P. C.—"We see no just cause of exception to the rejection of the evidence offered by the plaintiff, in reply. * * * The plaintiff knew from the answer what was to be the nature of the defense. He chose to attack, and, if he could, to disprove it, in advance of any evidence offered in relation to it by defendant; and he was permitted to do so by the Court. No restraint whatever appears to have been put upon him in this course of proceeding. This justly precluded him from the right, without the permission of the Court, of introducing, in reply, and at the close of the trial, merely cumulative evidence to the same point. *York vs. Pease*, 2 Gray, 282."

Holbrook vs. McBride, 4 Gray, 218.

In *York vs. Pease*, supra, the Court said that where the plaintiff anticipates the defense and has introduced what evidence he chooses, he cannot claim afterwards, as a matter of right, to accumulate testimony upon the same point.

"As a general rule in the conduct of trials, if a party elects to proceed in the first instance with proof to anticipate the defense, he should not afterwards be allowed to offer evidence on the same point in reply to the case made by the testimony of the defendant. To permit a party thus to divide his case leads to confusion, and gives him an unfair advantage over his adversary."

In a later Massachusetts case it was *held*, that where proper rebuttal also tends to sustain the case in chief, it is *discretionary* with the Court to admit it. But

Shaw, C. J., says: "The first exception is founded on
 "the rule, that each party, in his turn to offer evidence,
 "shall offer the whole which is pertinent, and which he
 "means to offer, on any one point of his case. This is
 "a salutary rule, and tends to secure regularity and
 "fair dealing in the conduct of trials, by giving the
 "adverse party notice of the strength of the case which
 "he has to meet. But the propriety of its application
 "in each particular case depends so much upon the
 "circumstances of each case, and the actual state of
 "the proof at the time it was offered, that it must be
 "left almost entirely to the Judge conducting the trial
 "to say whether it shall be permitted at that stage."

Chadbourn vs. Franklin, 5 Gray, 314.

Assumpsit for goods sold.

Plaintiff proved sale and delivery. Defendant gave evidence that the sale was on time unexpired. Plaintiff offered to show in reply that after the time testified to by defendant's witnesses, and before delivery, defendant promised to pay on delivery.

P. C.—"The ruling, that the plaintiffs were not entitled to offer additional evidence as affirmative proof of their original case, after the evidence of the defendant had been closed, furnishes no legal ground of exceptions. If admitted at all, it is a matter within the discretion of the Court, and is admissible under peculiar circumstances requiring it. Its rejection furnishes no cause for exception."

Macullar vs. Wall, 6 Gray, 507.

After we closed our case, *no evidence, strictly speaking, was competent except such as tended to contradict NEW facts*
 PROVED BY OUR WITNESSES.

Briggs vs. Humphrey, 5 Allen, 316.

In a New Hampshire case, the plaintiff contended that defendants were partners. On their part defendants introduced evidence of the manner in which the business was carried on, seeking so to show that they were *not* partners. In reply, plaintiff sought to rebut this inference by showing that the same method of conducting business was adopted in other yards. The Court below held that it was proper rebuttal, and for this the case was reversed.

P. C.—"The defendants, by showing the manner in which they carried on their business in that partic-

“ular yard, undertook to establish that they were not
 “in partnership. They relied upon specific facts as
 “showing how the truth was. The evidence then, to
 “be rebutting, should be confined to the transactions
 “under consideration. It should disprove the partic-
 “ular facts attempted to be shown upon the other side,
 “and should not consist of new matter. The plaintiff
 “might perhaps show such a custom or usage prevailing
 “in this kind of business, as would override the facts
 “and be an answer to the position assumed by the de-
 “fendants. But such evidence would be in the nature of
 “new evidence; it could not be regarded as rebut-
 “ting.”

Foye vs. Leighton, 2 Foster, 75.

In *Hathaway vs. Hemmingway*, 20 Conn., 195, the plaintiff made title to land under an execution. The defense was two-fold: first, no title under the execution, because of a sale under a prior execution; second, a conveyance by the plaintiff. Defendant only put in evidence on the first branch of his defense. This the plaintiff rebutted by showing fraud in the prior execution.

Defendant then offered to give proof of the second branch of his defense; but the Court held it was clearly testimony in chief, and came too late.

P. C.—“The rule upon this subject is a familiar one.
 “When, by the pleadings, the burden of proving any
 “matter in issue is thrown upon the plaintiff, he must,
 “in the first instance, introduce all the evidence upon
 “which he relies to establish his claim. He cannot, as
 “said by Lord Ellenborough, go into half his case, and
 “reserve the remainder. *Rees vs. Smith*, 2 Starkey
 “Ca., 31. *Rex vs. Beezely*, 4 Carr. & Pa., 220. *Bray-*
 “*den vs. Goulman*, 1 Monroe, 115. *Rex vs. Stimpson*, 2
 “Carr. & Pa., 415. *Knapp vs. Haskell*, 4 id., 590. The
 “same rule applies to the defense. After the plaintiff
 “has closed his testimony, the defendant must then
 “bring forward all the evidence upon which he relies,
 “to meet the claim on the part of the plaintiff. He
 “cannot introduce a part, and reserve the residue for
 “some future occasion. After he has rested, neither
 “party can, as a matter of right, introduce any further
 “testimony which may properly be considered testi-
 “mony in chief.”

S. P.—*Storey vs. Sanders*, 8 Humphrey (Tenn.)
 663.

Account: Plea of set off.

Plaintiff insisted on introducing evidence that the set-off had been settled by arbitration. After defendant rested, plaintiff was allowed in rebuttal to prove by other witnesses the same facts testified to by his witnesses in chief, in regard to the arbitration. *Held*, error.

P. C.—“As the plaintiff chose in the first instance to go into evidence to defeat the defendant's offset, he should then have introduced all his evidence for that purpose, and not cut it up by offering a part then and a part afterwards.”

Williams vs. Jewett, 12 Ind., 311.

Libel: Plea, general issue, and several pleas of justification.

Plaintiff, after proving the libel, called a witness to disprove certain facts alleged in the justification. Defendant then gave evidence in support of his pleas. After defendant closed, plaintiff proposed to call another witness to disprove other facts stated in the justification.

Abbott, Lord Chief Justice, says: “In actions of this nature, the plaintiff may, if he thinks fit, content himself with proof of the libel, and leave it to the defendant to make out his justification; and then the plaintiff may, in reply, rebut the evidence produced by the defendant. But if the plaintiff in the outset, thinks fit to call any evidence to repel the justification, then, I am of opinion, that he should go through *all* the evidence he proposes to give for that purpose, and that he shall not be permitted to give further evidence in reply. It is much more convenient, for the due administration of justice, that this course should be adopted; otherwise there would be no end to evidence on either side.”

Brown vs. Murray, Ry. & M., 254. (21 E. C. L., 431.)

Assumpsit by endorsee of a bill of exchange against acceptor: Plea, traverse of endorsement to plaintiff.

Plaintiff rested in chief on mere proof of the handwriting of the endorsement. The defendant gave evidence that plaintiff was too poor to have given value for the bill, and had denied all knowledge of it, or that he had authorized the bringing of the action. Plaintiff proposed in reply to show that he had the means to discount the bill, and, in fact had discounted it. This the

trial Judge rejected. Verdict for defendant on rule *nisi* for new trial.

Lord Denman, C. J., delivered the opinion of the Court:

"The question in this case was, whether the learned Judge was right in refusing to allow a witness * * * to be called by the plaintiff in reply, upon the trial of an issue whether a bill of exchange had been endorsed. * * The issue was single, and the onus of proof was upon the plaintiff. He might either rely upon a *prima facie* case, or go into all the evidence he had to confirm the *prima facie* case; but we think that he was not entitled to rely, in the first instance, upon a *prima facie* case upon that issue, and afterwards, when that *prima facie* case was called in question by the defendant, to call other evidence to confirm his *prima facie* case. This we think he was not entitled to do, if objected to, and that the learned Judge was right in refusing to allow him to call the witness."

Rule discharged.

Jacobs vs. Tarleton, 11 Q. B., 419. (63 E. C. L., 423.)

The case of *Abbey Homestead Association vs. Willard*, 48 Cal., 619, so much relied upon by plaintiffs below, was ejectment. Plaintiff in chief proved a lease from him to defendant. Defendant proved fifteen years adverse possession. The plaintiff in reply was allowed to meet this case by showing that he claimed under a Mexican grant, the patent for which had not been issued long enough to allow the five years to run before the acceptance of the lease, which the Court held stopped the running of the statute. It was argued for the plaintiff that the fact that defendant was in possession when he accepted the lease, removed the estoppel of the lease, and that therefore the burden of proving title was cast on the plaintiff. But the Court held otherwise, and that by the production of the lease the plaintiff made out a *prima facie* case of title; and then the burden of proof was on the defendant to show title in himself, and that therefore when he proved, or gave evidence of such title in himself by prescription, the plaintiff was entitled to rebut by destroying the prescription, as he did.

In other words, the Court put it like a case where a plaintiff in ejectment proves a *prima facie* title, and defendant meets it with a deed from plaintiff, and the plaintiff in reply shows such deed to be only a mort-

gage; that is, they put it as if the plaintiff, instead of connecting himself with the Mexican grant, and bringing himself within the exception to the Statute of Limitations, had offered in reply to disprove the facts of possession of which the defendant in making his case had given evidence. It will be observed that the plaintiff, in his opening case, did not go into proof of title at all; and the Supreme Court expressly and carefully put its ruling upon the ground that the burden of proof upon the question of title was with the defendant. Of course, all that the case *decides*, at least all that it was necessary to decide, was that it was not error for which an appellate Court could reverse, to admit the testimony in reply—not that it would have been error to reject it at that stage and under the circumstances, which circumstances are widely variant from those upon which Judge Brundage here exercised his discretion.

See: *Johnston vs. Jones*, 1 Black, U. S., 226.

EJECTMENT—Plaintiff gave in evidence a controller's deed, proved its possession and rested. Defendant showed facts which made the controller's deed void, and rested. Plaintiff then offered to establish a right of recovery by showing title by foreclosure of a mortgage executed by defendant. Rejected, and affirmed on error.

P. C. "Plaintiff has a right to reply, by evidence to contradict, cut down, modify, explain, or in any way vary the evidence of the defendant; but beyond this he cannot go without the permission of the Judge; not even to supply a defect in his own evidence. (*Rex vs. Hilditch*, 5 Carr. & P., 299; *Briggs vs. Aynsworth*, 2 Moo. & Rob., 168-169, note A). * * * The plaintiffs were bound to introduce all their evidence in the first instance. * * * A simple declaration of the plaintiff's counsel that his proof is closed, or, in the usual phrase, that he rests his case, cuts him off from all further evidence except what shall be strictly proper by way of reply. (C. & H. Notes, 712-718). * * * The introduction of a distinct substantive ground of claim in reply is not admissible within any of the cases. * * * Such a step should be avoided out of a regard to its ill effect as a precedent."

Leland vs. Bennett, 5 Hill, 288.

In our case the complaint *ex industria* alleges title

and possession *at the commencement of the action*; but by specifically alleging title in the State as late as 1876, and *expressly* confining and restricting the allegation of possession to the time of suit brought, while extending in terms the allegation of title in the plaintiff back to 1876, or a year or more before suit, in effect negatives any idea of possession by plaintiff at the time of the injury complained of. Then, when the allegations concerning the damages were withdrawn, the whole case was left to hinge upon *title*, injury to inheritance, etc.

In *Wilbur vs. Brown*, 3 Denio, 360, it is held that in an action on a case for diverting water, the right of the plaintiff must be accurately stated in the declaration. "It is of the utmost consequence to the defendant that the plaintiff should, in this action, be held strictly to the rule allowing a party to recover only according to his allegations and proofs so far as regards the statement of his title to the thing in dispute, as such title is directly at issue. * * The plaintiff could only recover upon proving the case stated in his declaration. (*Williams vs. Morland*, 2 Barn. & Cress., 910; *Bigelow vs. Battle*, 15 Mass. R., 313; *Sumner vs. Tileston*, 7 Pick. R., 198; *Fentimen vs. Smith*, 4 East., 107.)"

"When affirmative pleas of justification are put upon the record with the general issue, the plaintiff's counsel may, if he pleases, not only prove the facts of the declaration, but also may in the first instance, and before the defendant's case is gone into at all, go into any evidence which tends to destroy the effect of the justification by way of anticipating the defense; or he may, if he pleases, content himself with proving the fact on the general issue, and then close his case, leaving the defendant to make out his justifications as he can, and afterwards go into evidence in reply as to the justifications. But if the plaintiff's counsel, knowing by the pleas what the defense is to be, close their case and trust to evidence in reply, they are restricted to such evidence as goes exactly to answer the case proved, or attempted to be proved, by the defendant in support of the justifications, and they cannot be allowed to go beyond it."

2 Addison on Torts, 1169.

"It was in the discretion of the Court to admit or reject this evidence."

Ahrens vs. Adler, 33 Cal., 608.

In *Phelps vs. McGloan*, 42 Cal., 300, the defendant proved that the tenant of her grantor was in possession and paid rent to the landlord, who furnished one Phelps with milk. Plaintiff then called Phelps, who swore that he was the landlord and received the milk as rent. To rebut this, defendant proved that Phelps agreed to pay cash for the milk. Plaintiff then offered to recall Phelps to deny the agreement to pay cash for the milk. Rejected as not rebuttal. Ruling affirmed on appeal.

“For the purposes of correct and regular proceeding, “and as far as possible, of placing the claims of parties “upon equal footing in the trial of causes, all Courts “are presumed to have adopted certain rules, applicable to the order in which testimony shall be given. “The rule is, that the party on whom rests the burden “of proving any fact, shall first proceed with evidence “for that purpose, and if no testimony is given tending “to disprove the fact thus attempted to be established, “no farther testimony will be received upon that “point.”

Pingry vs. Washburne, 1 Aiken, 264.

If the object of introducing these certificates of purchase was simply to carry back by relation the title already proved in chief by the production of the patents, of course it was not only cumulative, but was inadmissible, as in the teeth of the express allegation of the plaintiffs' sworn complaint. If it was not to prove title anterior to the issuance of the patents already in evidence, but was simply to show a prior possessory right to the land, it was equally cumulative, because the evidence offered in chief tending to establish prior, actual or constructive, possession on the part of the plaintiffs, was directly upon the same point and offered for exactly the same purpose. But in no sense of the word was it rebuttal of anything proved by the defendant. It did not tend to disprove any one fact or circumstance proved by the defendant, but was simply introductory of a new and collateral fact of the same nature and character, and tending, if admissible at all, only to strengthen the case already attempted to be made in the opening.

We think no case can be found where such testimony was *rejected* below, that such ruling was held to be error on appeal.

Cases may be found where it has been held not to

constitute error for the Court below to exercise its discretion in allowing similar testimony; but none where, having exercised that discretion against allowing plaintiff thus to cumulate the case attempted to be made in his opening, such action has been held to be error; and especially not where, from the very frame-work of the pleading, the nature of the defense was known to the plaintiff beforehand—a *fortiori*, not where the plaintiff not only knew the defense, but anticipated it, and attempted to rebut it before resting his case.

NONE OF THE CASES CITED BY APPELLANTS IN THEIR "POINTS AND AUTHORITIES" SUSTAIN THE CONTENTION THAT ANY REVERSIBLE ERROR WAS COMMITTED IN EXCLUDING THE TESTIMONY OFFERED AS "REBUTTING EVIDENCE."

From some of them we have sufficiently quoted *supra*, to show this. As to the others, appellants say (p. 73) they find but one case (*Rowe vs. Brenton*) in point as to the channel.

This case is a fair sample of the whole. They are cases where the ruling was made at *nisi prius*, and the ruling never assigned as error; or if so assigned and passed upon, affirmed as matter of discretion, because the testimony was *admitted*, and *not rejected*; or when the ruling was by consent, or not excepted to at all; or where the evidence rejected was on a point for the first time brought out by the other party, after the party offering it had rested, and consequently the appellate Court could and did say that it was offered at the very first opportunity and to rebut a new point, the making of which could not have been anticipated. Thus the report of *Rowe vs. Brenton*, in 3d Manning and Ryland, shows that the plaintiff improperly kept back his proof of title altogether, and rested on proof of possession alone. This it was which caused all the confusion and entanglement which followed. After a refusal to nonsuit (p. 139), "It was then urged by the Attorney-General and Sir J. Scarlett, that if the plaintiff stopped here he could not afterwards go into evidence of property, but that he would be entitled only to contradict witnesses to particular facts. Lord Tenterden, C. J.—*There may be great difficulty in giving further evidence.* Bayley, J.—*Where evidence is given on one particular point, you give the whole of your evidence upon that point.*"

After defendant closed (p. 281) the plaintiff called evidence in reply, and "The counsel for the defendant

say, to irrigating and supplying with water lands in said notice of appropriation designated, and lying along the route of said canal; and all of said water so diverted by defendant has been needed, used and consumed on said lands.

In all matters and things connected with or relating to said appropriation and diversion of water, defendant and defendant's grantors have fully complied with the provisions and requirements of Title VIII, Part IV, Division II, of the Civil Code.

IRRIGATION A NECESSITY :

The lands designated in said notice and to irrigate which the waters of Kern River were appropriated and the Calloway Canal was constructed, border upon Kern River, and extend therefrom northward in one compact body along the route of said canal. To said lands irrigation is a necessity, and there is no means of irrigating them save by the waters of Kern River appropriated through the Calloway Canal. Without the water furnished them by the Calloway these lands would be, as they had always been before its construction, desert and barren, unproductive and worthless, but with that water they have proven highly productive and valuable, and large portions of them are now settled upon and cultivated by many people. As each succeeding year it will require less and less water to irrigate each acre of these lands, by reason of the fact that when dry and first irrigated they absorb more water than afterwards when constantly irrigated, the water now conveyed by the Calloway will hereafter be sufficient to irrigate seventy thousand acres thereof.

The use to which the water diverted by defendant is applied is to supply a natural want, and the quantity taken is necessary and reasonable.

PLAINTIFFS' LACHES:

At and during the times when the acts constituting the appropriation and diversion by defendants and its grantors were done, plaintiffs knew and were fully in-

pleaded the older grant of defendant and, in making his own case in chief, given some evidence on the point of adverse possession, thus anticipating defendant's case both by his own pleading and proof, had offered in rebuttal evidence of a third grant, the case would have been something more like ours.

Doe vs. Gorley, also cited by appellants, falls within the same category, except that there the case was a *nisi prius* case and the evidence was *admitted*, not rejected. But it differs from our case in that the evidence was admitted as being rebuttal in that it was not the setting up a new claim or different claim of title, but as tending to counteract the case made by the defendant, the latter will being treated as a *revocation* of that set up by defendant; and so the counsel put it, saying they relied solely on the title as first put in by them in the opening, and only wished to put in the will to show the revocation. The case cited by us from 5th Hill (*Leland vs. Blount*), shows the distinction plainly.

The *nisi prius* case of *Gilpins vs. Conssiqua* recognizes the same distinction, so confining rebuttal as the syllabus shows: "Plaintiff may * * explain or contradict evidence which comes out upon the defendant's examination, but not if in the opening the plaintiff had given evidence of the same matter," etc.

The case of *Union Co., vs. Crary* is not, we think, fairly stated by counsel. It is in fact an authority for us. The only thing *decided* was that certain testimony was properly ruled out, being "admissible only in the discretion of the Court below, * * not in rebuttal, but as part of the plaintiff's original case."

Wade vs. Thayer only holds that when for the first time in the progress of the trial, the defendant, after the plaintiff had rested, introduces evidence tending to impeach the witnesses of the plaintiff, the plaintiff may contradict such evidence in rebuttal, *because* it is his first and only opportunity to do so. And so was *Lisman vs. Early*. The evidence was held strictly rebutting, and on a point where the defendant had the *onus*, and such as the plaintiff could not possibly anticipate. And the same may be said of *Hayward vs. Draper*, when the evidence was held proper rebuttal, because "the plaintiff had no opportunity to meet *this particular*

“*piece of evidence* until the defendant produced it. * *
 “It was not new evidence to support the issue in chief,
 “* * but it was evidence offered and competent *for*
 “*the single purpose* of impairing the effect of a piece of
 “testimony introduced by the defendants.”

The case of *Briggs vs. Aynesworth* was a *nisi prius* case, and was, as is shown by the reporter's notes, as well as by the observation of Lord Denman, that the proper course would have been to introduce the evidence in the opening, simply a case where the evidence was *admitted* in the exercise of discretion. But further, it was evidence which went *directly* to the *point* made by the evidence of the defendant. As much so as would evidence in our case showing that the Calloway notice was not posted. The true rule is stated in the reporter's note, and is upheld by Lord Denman in subsequent cases cited by us, *e. g.*, “evidence which the plaintiff might have given in chief is inadmissible in “reply.”

Sample vs. Robb is another case of *discretion*. The ruling below was affirmed on that ground, the Court expressly saying it did not matter whether it was strictly rebuttal or not.

The Vermont and Iowa cases cited have no force here, because they proceed upon the principle that in those jurisdictions the rules of rebutting testimony are not in force, while it has always been part of our jurisprudence, and is expressly enacted in our Code.

It must, then, be apparent to the Court that the ruling out of these certificates as not being rebuttal was not a mere technical ruling, and worked no hardship upon the appellants. There was not and could not have been the slightest pretense that their failure to introduce the certificates in their opening case was the result of any inadvertence or mistake on their part. The mere fact that the exemplification on the certificate offered, bore date pending the trial proves nothing. If the appellants were taken by surprise, and if their failure to offer the certificates in the opening was through inadvertence or mistake, their course was to have made that fact appear to the Court and to have appealed to the discretion of the Court, instead of putting their right to introduce the evidence, as they did, upon the ground that it was technically evidence in rebuttal.

Besides, the record shows, and it is evident from the care and elaboration with which the case was prepared and tried, that this holding back of this evidence was of set purpose on the part of the appellants; and the reason why they so framed their case is not far to seek, because, by an inspection of the diagram "S" hereto attached, it will be seen that if they had contented themselves with proving in the opening only a title to the ground covered by the certificates of purchase, they would have made out no case for the interference of a Court of Equity; from the fact that only a very infinitesimal portion of such lands touched in any way the water courses which they alleged to exist, and by virtue of which alone they claimed the rights of riparian proprietors. It was evidently, then, to avoid this consequence that they framed their case as they did, and endeavored to antedate our appropriation, and dispose of it in advance, by proving a possession anterior to our appropriation, instead of proving in the opening whatever title or equity they had by virtue of the certificates of purchase. *

Now this rule of rebuttal is not a mere rule of practice, but is an essential and a wise rule for the due presentation of the rights of parties on the trial of causes. To set aside these rules not only leads to confusion and uncertainty in practice, but will give a perilous advantage and an unjust advantage to the plaintiff, upon whom lies the burden of proof, in allowing him to fish for the case of his adversary and then mend his case in rebuttal, if the case should turn out different from what he supposed it would.

This very case is a fitting illustration. Not pretending that they were taken by surprise, not pretending that they did not know in advance exactly the defense they had to meet, having themselves gone into that very defense and sought to anticipate it by proving possession and the equity arising from possession, making no appeal to the discretion of the Court, making no claim that they were misled or mistaken, they endeavored in rebuttal, having failed upon the case which they did attempt deliberately to make, to make a new and a different case by virtue of the certificates of purchase. Having fished for and having seen what our case was, they attempted in this way, in violation of these wholesome rules of practice, to mend their case and to make a different case in the rebuttal; and that, too, in the teeth of their own pleading, which asserts that the

* It was thus attempted to show the right to a compact and connected body of riparian land, while the certificated land consisted only of disconnected parcels.

title was in the State until 1876, whereas they now seek to prove in rebuttal an equity antedating that time.

Now, if one rule of pleading is better settled than another, it is that a party who alleges a legal title must prove a legal title; that, in any form of proceedings, whether it be an action at law or a suit in equity, the party who alleges simply a legal title or a legal seizin shall not be allowed to prove an equitable claim. Here, even if it was proper rebuttal to prove this alleged equity, even if they had not anticipated it and attempted to prove the same kind of a case beforehand, in anticipation and in destruction of our claim of appropriation, the framework of the pleadings would have denied them the right to prove an equitable when they had only alleged a legal title.

They not only pleaded our defense for us, but they introduced evidence in their opening case upon that defense; not only proved their patents as showing the title they had alleged, but, not stopping at that, went on to further anticipate our defense by attempting to prove a possession of the land from 1869, antedating our appropriation of the Calloway. Then they went into our affirmative defense; put Mr. Carr on the stand, and Mr. Roberts, and proved that in 1875 our ditch had been dug, and showed the grade of it, and that water had been running in it, and all about it; questioned Mr. Carr (see Trans. II, fol. 2163), as to the time when Calloway and his associates conveyed the property to the defendant, and about the deed that was made, and as to when he, Carr, took charge; questioned Roberts (fols. 274 to 282), as to the quantity of water in the Calloway in 1876 and in 1877, May 1877, August 1877, also 1878, 1879, 1880 and 1881, in fact up to the time of the trial, and as to the depth of water in the canal at those dates; questioned him as to the width of the headgate ever since 1876, and as to throwing a wing-dam clear across the river; questioned him too (fol. 283), as to the grade, slope, and various widths of the canal, and the amount of land irrigated by the Calloway canal in 1881, 1880, 1879, 1878 and 1877; even offered the articles of incorporation of the Kern River Land & Canal Co., dated May 11th, 1875 (fol. 294).

In short, they attempted to prove their own case by patents and prior possession, attempted to prove our case by appropriation and to defeat it by prior possession; and then, without any allegation of mistake or inadvertence, or any appeal to the discretion of the Court, asked leave to come in in rebuttal and

make not only a new case, cumulative to the case made in their opening, and a different case, but one directly in the teeth of their own pleadings and averments of title in their complaint.

The appellants have cited cases where, in the discretion of the *nisi prius* court, the plaintiffs in ejectment and similar actions, have been allowed to introduce evidence in rebuttal to disprove the defendant's title. But these cases only prove that that is admissible in discretion, not as a matter of right; that, as a matter of strict right, the only rebutting testimony that the plaintiff in cases of this kind can be allowed to introduce is that which goes directly to meet the facts attempted to be proved on the part of the defense.

In Malone on Real Property Trials, page 84 (citing Cole on Ejectments, page 300, and 1 Taylor on Evidence, page 336), it is said: "The claimant must produce, in the first instance, all the evidence upon which he relies in support of his case; he cannot be permitted to prove a mere *prima facie* title, and when that is controverted by evidence by the defendant to produce further evidence in reply to strengthen and confirm his *prima facie* title. Where, however, evidence in reply is to disprove the defendant's title on ground of defense, it seems that *in the discretion of the Court* the plaintiff may be allowed to offer evidence, notwithstanding its tendency to support the original case." (Here and elsewhere, in many instances, the italics are our own.)

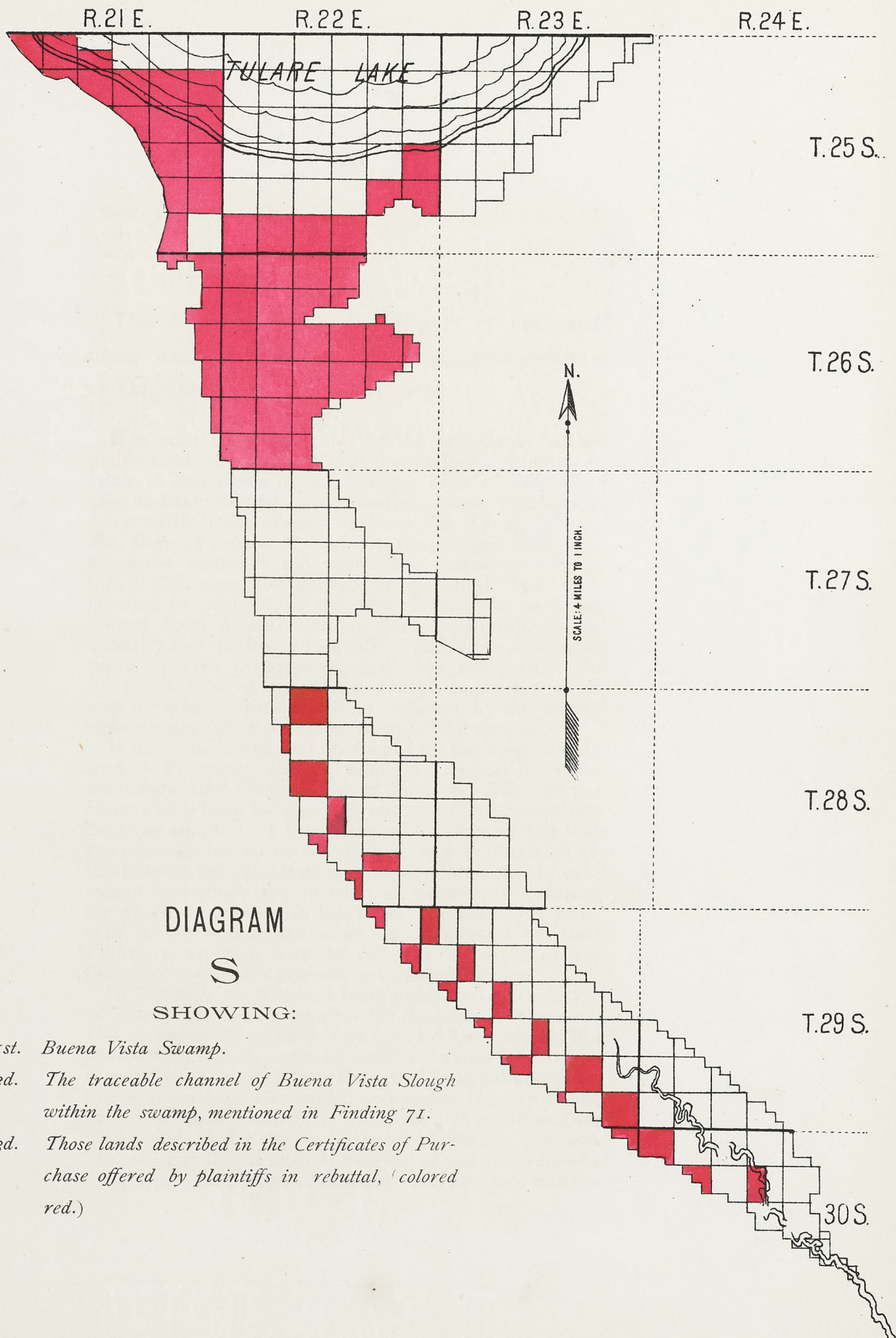
Appellants contend that because some of the evidence ruled out—the certificates of purchase—was *documentary*, the discretion of the Court should have been controlled by that fact. But, though the Court at *nisi prius* consider that fact in exercising discretion, it is not controlling, nor is the evidence within the term or description. At best the certificates were but *prima facie*, and to have admitted them was to open the whole case on title to a fight *de novo*.

But even supposing that the plaintiffs were not in fault for not introducing the certificates of purchase in their opening case, and that they constituted technically rebutting testimony, their rejection affords no ground for reversal. The offer was simply to prove the certificates of purchase, and in some instances the assignments thereof to the plaintiff. There was no offer to prove that the United States had ever so acted as to

vest the title in the State. Even if the pleadings and findings could control this question of law, when the plaintiffs sought to go behind the pleadings and introduce their asserted equity, they must show a complete one. Nor was there any offer to prove the payment of any portion of the purchase money to the State, or that the laws of the State in regard to the purchase of swamp and overflowed land had been complied with by the plaintiffs or their predecessors. And even if they had offered to prove those facts the result would be the same; because it was immaterial and irrelevant testimony, and would have been so even if offered in chief.

This brings us to the consideration of the great question as to the law of this State, both now and since its foundation, on this vexed question of riparian rights.

[We here insert Diagram "S," referred to on page 19.]



B.

The doctrine of Riparian Rights is not, and never was, applicable to the public lands—State or Government—within California.

It is contended on behalf of the appellants, as we understand their counsel, that the modern English doctrine, as laid down in the leading case of *Mason vs. Hill*, and the English and American cases which have followed it, is and always has been the law of California; that by reason of that law parties who have title along the banks of any one of the non-navigable waters in California are entitled, as against all but *supra* riparian proprietors, to the flow of the water as it has always been accustomed to flow, undiminished in quantity and unaltered in quality; and, even as against *supra* riparian proprietors, that they are entitled to the same flow of the water except in so far as it may have been diminished or affected by the proper riparian uses of those above them on the stream.

It has been contended on behalf of the respondents by Col. Flournoy, and we shall not repeat his argument here, that the doctrine of *Mason vs. Hill*, and the cases which have followed it, was not the common law doctrine adopted by the State of California; but that the common law as we adopted it, and as it existed at the time of the colonization of this country, was in substance and effect the doctrine of prior appropriation for which we contend in this case. In addition, however, to the authorities cited on that point by Col. Flournoy, we wish here to call the attention of the Court to one or two extracts not quoted by him.

In *Woolrich, on Waters*, a book published, we believe, as late as 1851 and long after the decision in *Mason vs. Hill*, on pages 247 and 256 (Law Lib. Ed.), speaking of the obstruction and diversion of water, the writer lays down a very different doctrine from that cited by appellants from the more modern text-books, and states the law about as Col. Flournoy stated it. He says: "It is allowed on all hands that water is, in the first instance, common to all, but that it is in the power of an individual to appropriate a portion of that universal property to him-

“self for his own private benefit, whereby he acquires
 “a title to use the stream (so reduced into possession as
 “it were,) independently of and without molestation
 “from others. A water-course, however, being obvi-
 “ously of great commercial value, rights, both in public
 “navigable rivers and others, were soon asserted; and
 “then it happened, that the person who first appropri-
 “ated the water could no longer go on engrossing the
 “channel to his own advantage; because, however
 “he might have been justified in so doing *before a sec-
 “ond appropriation*, he would, probably, interfere with
 “his neighbor, by any *further* acquisition.”

He further says that in the case which is cited from 1 Simons & Stuart, the Master of the Rolls held that no action lay for diversion except by a person who sustained an actual injury; and that that case was at first sustained by *Mason vs. Hill*, when it was held, contrary to *Bealey vs. Shaw*, that twenty years must elapse before a party who has taken unappropriated water can be secure in his possessions against a *supra* or *infra* proprietor. That, however, was modified in the same case as reported in 5 Barnwell & Adolphus.

Again, as late as 1823, in Pennsylvania, we find Judge Duncan delivering the opinion of the highest judicial tribunal in that commonwealth, declaring and beautifully expounding the doctrine of Blackstone and of the California pioneers. (See *Strickler vs. Todd*, 10 S. & R. Penn. 72.)

Comyn's Digest, we believe, has always been considered the most authoritative exposition of the common law at the time it was written. In 7 Comyn, page 292, it is said: “Semble, that the right to the use
 “of the water of rivers as an easement to lands contig-
 “uous to rivers, *is a right of occupancy*. The first settler
 “may use as much as he please, but, having taken a cer-
 “tain quantity by a channel of a certain dimension, and
 “another person having settled lower down the stream,
 “and taken the use of the water subject to the then
 “definite use of the water by the first settler, the latter
 “is entitled to enjoy as much as he can so occupy
 “in a similar definite manner, and *though the prior
 “settler might have previously used all the water*, he cannot
 “then abridge the use of the second settler and occu-
 “pant.”

If we compare the language of the authorities just above quoted and of those quoted on the same point by Col. Flournoy, with the earlier California decisions and with the decisions of the Supreme Court of the United

States since the year 1874, we at once perceive how similar and nearly identical the doctrines of the two sets of cases are; that, in each, it is the doctrine of prior appropriation which is asserted and maintained as against the English modern doctrine of the absolute right to the flow of the water, *ex jure nature*, and without regard to any user or occupancy or appropriation whatsoever. But in comparing the earlier California decisions with the decisions of the Supreme Court of the United States, commencing with *Atchison vs. Peterson* and *Basey vs. Gallagher*, down to *Broder vs. The Natoma Water Company*, we see one striking difference. While all the California decisions sustain the doctrine of occupancy and appropriation as opposed to the doctrine of riparian rights, so called, in some of the opinions, the result is reached by an affirmation that they were but following the common law which we adopted; while in the cases in the Supreme Court of the United States the opinions, as well as the decisions, seem to agree in holding that the early California decisions, and that the California doctrine was a departure from the common law, and can only be sustained by holding that the common law was inapplicable to California, and therefore was not adopted by California as a part of the common law. So say all the text writers, Cooley, Washburn, etc.

So far as this question is concerned, it perhaps makes no difference by which process of reasoning we reach this result. The result itself is clear and sustained by all the California authorities and by the authorities in the Supreme Court of the United States. And that is, that the right to flowing water does not, here and upon the public lands, depend upon the ownership of the soil and banks of the stream, but depends upon and is governed by and limited by the principles of prior appropriation and first occupancy and use.

If prior appropriation, by the common law as we adopted it, be the test of the right, that is all we need ask in this case. If, however, as some of the *Opinions* in the early California cases and even in the later California cases expressed it, they had simply followed the common law which we adopted, then it follows equally that this case must be disposed of upon the principle of appropriation and not of riparian rights.

Now it is argued on behalf of the appellant that the case of *Mason vs. Hill* did not introduce any new departure into the law of England, did not enunciate any principles new to their jurisprudence, did not change

the law on this subject as a statute changes a law by introducing a new rule, but was simply declaratory of what had always been the law of England on that subject and simply corrected errors into which the earlier judges had fallen in expounding that law. However this may be, the fact remains that it was only at a period long since the emigration of our ancestors that the common law as claimed by the appellants here was authoratively declared and determined. But if it could be maintained that the doctrines laid down in *Mason vs. Hill* were always the common law, and should thence be argued that it is our law of California, it seems to us to require little reflection and examination to show that such a rule of law was not adopted by us as part of the common law, because of its manifest and plain inapplicability to our conditions and circumstances.

We cite below many instances, out of the numberless ones with which the books abound, where undoubted, settled and undisputed canons of the common law as they existed at the time of the emigration of our ancestors have been declared inapplicable to our condition, and therefore have not been enforced by our courts. And we assert that in no single one of those instances has the incompatibility between the common law and our necessities, has the inapplicability of those doctrines of the common law been so obvious, so self-evident and so complete as in that which is presented by the attempt to apply the modern common law doctrine of riparian rights to the condition of things now and always existing in California.

In the first place, it is necessary to consider the physical characteristics of the two countries; because such difference is most pertinent and most pregnant in determining whether the Judge-made law evoked by the necessities of the one country should have, or can have, any proper application in the other and differing country. Your Honors all know the physical conditions of California, and its wants, in so far as this question of water is concerned. It may be well, however, though you are equally aware of it, to quote from a modern writer a description of the physical characteristics and peculiarities of England. Taine's *English Literature* (Book I., ch. I., and Book IV., ch. III.), furnishes us a good description of England in this regard:

"Picture, in this foggy clime, mid hoar-frost and storm, in these marshes and forests, half naked savages,

a kind of wild beasts, fishers and hunters, but especially hunters of men; these are they, Saxons, Angles, Jutes, Frisians; later on, Danes, who during the fifth and the ninth centuries, with their swords and battle-axes, took and kept the Island of Britain. A rude and foggy land, like their own, except in the depth of its sea and the safety of its coasts, which one day will call up real fleets and mighty vessels; green England—the word rises to the lips and expresses all. Here also moisture pervades everything; even in summer the mist rises; even on clear days you perceive it, fresh from the great sea-girdle, or rising from vast but ever slushy meadows, undulating with hill and dale, intersected with hedges to the limit of the horizon. Here and there a sunbeam strikes on the higher foliage with burning flash, and the splendor of the verdure dazzles and almost blinds you. The overflowing water straightens the flabby stems; they grow up, rank, weak, and filled with sap; a sap ever renewed, for the grey-mists creep under a stratum of motionless vapor, and at distant intervals the rim of heaven is drenched by heavy showers.” * *

After speaking of the winter, Taine describes the milder weather:

“Now, and in this fine season, over the whole circle of the horizon, rise the dull, wan, clouds, like the smoke of a coal fire. * * * The vast gray dome has drowned and hidden the whole horizon; the rain falls, close and pitiless. We cannot have an idea of it, until we have seen it. When the southern men, the Romans, came here for the first time, they must have thought themselves in hell. * * * Here we are at Newhaven, then at London; the sky disgorges rain, the earth returns her mist, the mist floats in the rain; all is swamped. Looking around us we see no reason why it should ever end. Here, truly, is Homer’s Cimmerian land. Our feet splash, we have no use left for our eyes; we feel all our organs stopped up, rusted by the mounting damp. We think ourselves banished from the breathing world, reduced to the condition of marshy beings, dwelling in dirty pools. * * * Yet here there are charming and always touching beauties; those, to wit, of a well watered land. When, on a partly clear day, we drive into the country and reach an eminence, our eyes experience a unique sensation, and a pleasure hitherto unknown. In the far distance, wherever we look on the horizon, in the fields, on the hills, spreads the always visible verdure; * * * lovely meadows overflowing with high, thick grass;

here and there a cluster of lofty trees; pasture lands hemmed in with hedges. The mist rises insensibly between the trees and the prospect swims in a luminous vapor. There is nothing sweeter in the world, nor more delicate than these tints; * * * a sweetness almost painful, a strange charm, breathes from this inexhaustable and transient vegetation. * * * It is too fresh; it cannot last. * * * The rolling water-drops shine on the leaves like pearls; the round tree-tops, the wide spread foliage whisper in the feeble breeze, and the sound of the falling tears left by the last shower never ceases. * * * In the strangeness, the rarity of this spectacle, we understand for the first time the life of a humid land."

Now, even in a country watered as this is described to be—where one would think the dwellers all over the land, like the owners of the swamps in California, would only be thinking of the best way to get rid of the surplus moisture and not watching out lest some one should take some of it away from them, where the only use of water would necessarily be a use confined to the stream itself, a use such as that of domestic purposes, household purposes, quenching the thirst of stock or driving the machinery of mills, until by the progress of civilization and the increase of wealth and the peculiar development of the English society, land and all that pertained to land had come to have a sort of superstitious value in the eyes of the judges—we find that, until as late indeed as Eighteen Hundred and Twenty-odd, the same doctrine of prior appropriation, which commended itself to the earlier settlers of California, prevailed or at the very least was generally supposed to prevail, was so declared by the highest courts and ablest judges in their land. But if at this later day the judges in England, without the aid of any statutory enactment whatever, simply making law, making that common law which one of your Honors has well described as being simply common sense, declared the doctrine of *Mason vs. Hill*, even without reading their reasons, we would at once see why they so framed the law. They framed it to prevent any diversion of water away from its accustomed course. They did so, evidently, because they thought that such a rule was best suited to such a country and to the wants of such a people; and that of course for the reason that in such a country as theirs the only uses of water were the uses to be made direct-

ly upon the stream itself and along its accustomed channel.

Imagine, for one moment, that those judges, who made that law, had been sitting, as your Honors sit, in a country like California, where the uses of water were exactly the opposite; where to confine it to its channel and prevent its diversion, would simply have been to render useless the most essential element of the soil of the country; where diversion instead of being a thing to be forbidden was the thing of all others to be wished for and to be encouraged; where, in short, the only way to use the water of the stream was to divert that water from the stream. Is it not evident that the case of *Mason vs. Hill*, would and must have been differently decided? That there, as here, the doctrine of diversion and prior appropriation would have been declared to be the law of the land?

To illustrate: In England it was well settled that the test of a navigable river was the ebb and flow of the tide. It was taken as the test there because there it was a suitable test, because of the physical and geographical circumstances of that country. Of course, it was attempted in America by a blind and technical adherence to precedent and common law, to apply the same test to the great rivers of this country. And it was said: The law is well settled, there is no dispute about the rule, that those only are navigable rivers in which, and to the extent that we can trace the ebb and flow of the tide. For a long time that adherence to the letter, without regard to the reason of the common law, produced the strange result that the great rivers of America, though navigable by the largest craft, were held not to be navigable rivers. But finally a more comprehensive view was taken, and it was said, as it should have been said at the outset, that that portion of the common law was not adopted here, because not applicable here. If the ebb and flow of the tide is not the test and criterion of a navigable river here, why should the common rule prohibiting the diversion of water be a principle of riparian law here? The one is no more inapplicable than the other. The reason of the rule no more fails in the one case than in the other.

In the State of New York we find, we think, a very pertinent illustration of this point. In the earlier decisions the English rule had been adhered to, but was found to work badly in the altered condition and relations to which it was sought to be

applied. And finally, in the case of *The People vs. The Canal Appraisers*, 33 N. Y. 461, the question again came before the Court of Appeals of that State. In that case riparian owners along the Mohawk River claimed damages for the diversion of the waters of that river to their damage; the diversion having been made under the authority of the State Legislature. It was conceded that upon any application of the common law, or of the law as declared in some of the previous decisions in New York, the claim of the plaintiff was well founded; but the Court examined into those opinions and applied the principle for which we contend. They say: "By the common law, the flow and reflow of the tide is the criterion for determining what rivers are public. This rule is open to the double objection, that it includes some streams which are not, in fact, navigable, and which consequently might well be the subject of individual ownership; and it excludes other streams which are, in fact, navigable, and which in every well regulated State should belong to the public. Although the ebb and flow of the tide furnishes an imperfect standard for determining what rivers are navigable, it nevertheless approximates the truth, and may answer very well in the island of Great Britain, for which the rule was made. But such a standard is quite wide of the mark when applied to the great fresh water rivers of this continent; and would never have been thought of here, *if we had not found the rule ready made to our hands.* Now I think no doctrine better settled than that such portions of the law of England as are not adapted to our condition, form no part of the law of this State. This exception includes not only such laws as are inconsistent with the spirit of our institutions, but such as were framed with special reference to the physical conditions of a country differing widely from our own. It is contrary to the spirit of the common law itself to apply a rule founded on a particular reason to a case where that reason utterly, fails; *ces- sante ratione legis cessat ipsa lex.*"

The attempt would be futile to add anything to the force or appositeness of these suggestions.

In the same way, throughout the decisions, we find that the common law, whether in regard to the question of water rights or any other question has only been applied in this country in so far as it was applicable to our wants and conditions. As Col. Flourney quoted, Chief Justice Tyndall, one of the greatest of the Eng-

lish Judges, had stated prior to the decision in *Mason vs. Hill*, that by the law of England the person who first appropriates any part of the water flowing through his land to his own use, has the right to the use of so much as he then appropriates against any other. In Massachusetts, though in some respects and in so far as they could do so without injury to the interests of that commonwealth, they have followed *Mason vs. Hill* in preference to Chief Justice Tyndall, yet in other respects they have followed the latter. Thus, Angell says (Sec. 131), that the doctrine laid down in *Carey vs. Daniels*, in Massachusetts, *seems in accordance with that of Chief Justice Tyndall*. And in this respect, as we show elsewhere, the same has been done in Kentucky.

Now, it has sometimes been said, that the reason of this departure in Massachusetts from the strict common law rule relied upon by appellant, is to be found in their statutory enactment on the subject of flowing sites for dams, etc. But an examination of those statutes will at once show that they gave to the Courts of Massachusetts no such sufficient warrant for departing from and denying the application of the strict common law rule as is given to the Courts here by the various statutes of California recognizing the doctrine of appropriation and repudiating the doctrine of riparian rights. The fact is simply, that in Massachusetts, as everywhere, they took only such portions of the common law as they found applicable to their condition. They rejected those portions the reason for the adoption of which did not exist with them; and as it became necessary in Massachusetts to admit the doctrine of prior appropriation and first occupancy, in so far as the use of water for mills was concerned, so it became necessary in California to deny the application of the strict common law rule in so far as diversions were concerned. And there cannot be any doubt that if Chief Justice Shaw had been sitting, as your Honors sit, in a land like California, where the diversion of water for the purposes of irrigation was the paramount and important use of that element, he would have decided, as earlier California decisions held, that also to that extent the doctrine of the common law could not prevail and the reasons upon which it was founded were inapplicable.

By the common law, whatever dicta may be found to the contrary, it cannot be doubted for one moment that the use of water, even by riparian proprietors, for the purpose of irrigation, is an inadmissible use. Even in those of the United States where it has been at first

allowed, it has been followed by a departure from the common-law rules, and allowed, if at all, on the ground that in so far the common law was inapplicable and unsuited to the necessities of the territory. As in California no one will have the hardihood to deny that the use of water for the purposes of irrigation is a proper use, so in order to preserve consistency, all must admit, it seems to us, that the peculiar doctrines of the common law, founded upon their peculiar circumstances and prohibiting the diversion of water, are inapplicable.

Then, not only by *a priori* reasoning, by reasoning from the physical condition and wants of the country, would we not have expected the strict doctrine of riparian rights ever to have been framed as a new rule by California judges; but we find as a matter of fact, as proved by the uninterrupted course of judicial decisions, that the common law, as declared in *Mason vs. Hill*, has been always and consistently declared inapplicable here. For this we have not only the decided cases in the State of California, but we have the unanimous concurrence of the judges delivering opinions in the Supreme Court of the United States upon the very point, and all agreeing that the doctrines of the common law, to this extent, were found inapplicable, and therefore did not exist in California. Then, even in the absence of any legislation or any statute on this subject in our State, it seems to us that we must arrive at the conclusion that the doctrine of appropriation of water is, and always was the law of California, at least so far as the public lands are concerned. But when we come to consider the legislation of the State, if there could be any doubt on this question, that doubt is at once dispelled.

Not to dwell, now, upon the various acts of legislation set forth in the various opinions in the earlier California cases, let us take the very provisions of the Code which are so much relied upon by the appellants. Our position is proven not only by what is inserted in the Code, but also by what has been left out of the Code.

In the first place, if one were to sit down now with set purpose to declare, in the most emphatic and unambiguous terms, that the doctrine of riparian rights, as asserted by appellants, should no longer prevail in the State of California, we would defy him to express it better than it has been expressed in this portion of the Code—Secs. 1410 to 1422. In so many words it is enacted that the running waters in streams and rivers,

not navigable, in California may be acquired by appropriation. If that is not enacting the doctrine of appropriation and is not repudiating the doctrine of *Mason vs. Hill*, then there is no use in attempting to use language to express and make evident a definite purpose. The common law, as appellants construe it and claim it, says that water cannot be diverted, cannot be appropriated; that, short of prescription and the Statute of Limitations, no appropriation of it gives any right as against the rights of riparian proprietors. The Code declares just the reverse; exactly the contrary; and declares it as the law and the permanent law of this State—because they were not legislating for one moment, but were making a Code which was to last and to govern future transactions—that the right to running water shall thereafter depend, not upon the ownership of land, but upon the appropriation of the water. It is true there is a saving clause, the usual and useless saving clause in all such statutes, declaring that that portion of the Code shall not affect riparian rights. But, by all principles of construction, that cannot be held to wipe out and take away all effect from the portions to which it is but a proviso, but must merely be held as a saving against a possible interference with existing and vested riparian rights. The purpose is plain and manifest. It is to enact a Code of Laws; to lay down what shall be, for the future, the law of California on this subject; to provide the method by which title to water shall thereafter be acquired; because the framers of the Code must be taken to have known that their enactment could not, even if they wished it, be retroactive; they must be held to have known that it could only operate for the future, and in regard to the acquisition of rights in the future. So intending, so legislating, laying down a permanent rule, they declared that the rule shall be the doctrine of appropriation and the acquisition of the title to water by appropriation; and that the exception, the saving clause and proviso, shall only have the effect to preclude and prevent any possible interference with existing ^{or, acquired} rights. How idle, how foolish it would have been in the framers of this Code to enact this scheme for the acquisition of rights of water, for the disposition of water rights in this State, and at the same time, and as a part of that very enactment, to have inserted a provision which must necessarily deprive that scheme of all beneficial and operative effect. Can it be believed for one mo-

ment that, knowing, as they must have known, the physical and geographical state of the California country, knowing that, upon every stream of water of sufficient importance to demand legislation, upon all the great water-courses which they hoped would be hereafter utilized for the irrigation and other beneficial uses, that upon all those streams of water, at the outlet thereof, there must be inchoate rights, rights by certificates of purchase of swamp land, rights by pre-emption and settlement, rights by ~~absolute~~ ^{known} claims—knowing these facts, we say, can it be possible that they would have seriously attempted to enact a provision for the appropriation of water accompanied with a saving clause so suicidal as this would be, upon the assumption that it was not to be operative except upon streams where, from the outlet to the source, there were already no rights whatever; when they must have known, when your Honors know, when every man knows that there could not then by any possibility have been expected to exist any such stream of water on the whole broad face of California?

It seems to us, then, that this is the reason and the proper construction of this Code, and is the construction which your Honors must give it, unless you wish to give it a construction which makes it mean nothing and amount to nothing whatever.

But in addition to this, and what seems to us absolutely conclusive, is, as we have said, the pregnant force of that which they omitted to re-enact in the Code upon this subject. It is well known, it is a part of the history of the codes, of the Code Commission, it is apparent upon the face of the Codes themselves, that it was an attempt to codify and formulate and preserve the then existing law of California. On all other subjects, we find, where they intended to preserve the common law, where they intended to preserve the existing statutory law, they have simply re-enacted and preserved that law in the Code. Where they intended to change it they have changed it. But nowhere is the Code silent on any great principle of common law which was intended to be the law still, to remain in operation and force.

Again, we find, by comparing this Code as it was enacted, with the proposed Code of New York—the new Civil Code—that, so far as the Civil Code of California is concerned, it is almost a verbatim copy of the proposed New York edition. In other words, so far as the Civil Code is concerned, the Code which deals with

the rights of property and the principles of property, and the acquisition of property, we find that our Commissioners have copied word for word all the provisions of the New York Code which they did not intend purposely to omit and as to which they had not themselves made differing and inconsistent provisions.

Now, turning to this very subject, the only mention of riparian rights in the Civil Code of California is found in Sections 1410 to 1422. There, as we have said, we find an express declaration that the right to the use of running water may be acquired by appropriation, and the method of such acquisition is there prescribed, with a saving merely of existing and vested riparian rights. That is all we find in our Code on the subject of riparian rights. But, turning to the proposed New York Civil Code, we find, on page 79, in Section 256, a very clear condensation of the common law of riparian rights as understood and contended for here by the appellants. It says: "The owner of land owns water standing thereon, or flowing over, or under its surface, but not forming a definite stream. Water running in a definite stream *formed by nature*, over, or under the surface, may be used by him as long as it remains there. But he may not prevent the *natural* flow of the stream or of the natural spring from which it commences its definite course, nor pursue (? divert), nor pollute the same." For this statement of the common law many cases are cited in the New York Code.

We have quoted Section 256 of the New York Code. That was entirely left out by the framers of our Code. But backwards from Section 256 in the New York Code to Section 171, we find that our Code has almost literally copied theirs, down to and including Section 255 of the New York Code. Then, as we said, we find them leaving out Section 256—the only one which treats of riparian rights—skipping that and commencing with Section 257, which corresponds with Section 818 of our Civil Code, and from that point on again copying almost literally the New York Code.

Now, if it had been the intention of our Code, as it was the intention of the New York Code, to retain this common law doctrine of riparian rights, is it not clear that our Code makers, in their copying of the New York Civil Code, would not have taken pains to skip this very particular and essential section? What other inference can possibly be drawn from their copying all the balance of the formu-

lation of the common law by the New York Code makers and leaving out this particular one, than that they did not intend, as the framers of the New York Code did intend, to formulate and to re-enact and adopt as our law this riparian law of England as to water rights? Then when we add to this studied and studious omission of that particular part of the New York Code, the insertion in our Code of the portion which declares the right of appropriation of water and regulates the acquisition of water by appropriation alone, is not the inference absolutely convincing and inevitable that they intended to and did substitute the one for the other?

Now, in answer to all this—although the law of appropriation alone is applicable to California; although alone by upholding that law can its resources be developed; although to substitute now for that law the English law of riparian rights means absolute ruin to some of its greatest interests; although that English law is inapplicable here—they say it is an injustice; it is wrong, even to benefit large communities; even to carry out and round the destiny of a State; even though every argument from inconvenience dictates such a course, it is wrong to take from even one individual that which is valuable as a part of his property in order to give it to the enrichment and advantage of others, however numerous. But the misapprehension of counsel, it seems to us, in part consists in this: In ignoring the force and effect of the argument from inconvenience when we are considering the question of what is or ought to be the law, and not distinguishing its application in such cases from its use in the attempt to take from one man his well settled rights under the law, and give them to another. The question here is not, as in some of the Pennsylvania cases cited in this case, whether, because it is convenient even to a greater number, whether, because loss will be entailed if it is not allowed, one man shall come with his smelting works or with his mining operations and destroy the home and the vineyard and the farm of another man, where the law is well settled and the case is one of a plain invasion of a vested and enjoyed right. But the very question here is: What is and has been and ought to be the law of California on this subject? This is not the case, even, decided by Lord Denman, where an estate with water flowing over it, in its natural course, had descended perhaps through generations, and passed from purchaser

to purchaser with the understanding that the water passed with it and as appurtenant to it. But this is the case of a party acquiring the title to the public land of the State or of the United States, with full knowledge of the uniform custom of a quarter of a century that the waters of those lands had always been appropriated, at will, by all who found them unappropriated and who sought to and did apply them to a useful or beneficial purpose; with full knowledge of the fact that the decisions, from the very foundation of the State, had recognized this right of appropriation of water; with full knowledge of the fact that the Code had formulated this rule of appropriation, and had expressly declared it as the rule to govern future acquisitions of land and water rights in this State; with the knowledge that such had been the policy of the State Government; that such was the declared policy of the Government of the United States, evidenced not only by action and non-action, but by the express statute, passed as early as 1866, and which has time and again been construed by the Supreme Court of the United States to have been but a recognition of what had always been the law and policy of the Government upon that subject. Now then, in this condition of things, knowing all this, this party comes and attempts to acquire the title to the public land, by the policy of the Government which owned the same already dedicated, so far as the waters were concerned, to the first appropriator. Manifestly in such a case as that, the cases cited can have no application, and the argument from inconvenience which we have urged upon your Honors must be allowed full force, scope and effect.

But when we come to look at the reasons given for the doctrine of riparian rights, we see at once that those reasons, as Judge Field said, can have but little if any application here. Let us state them as strongly against us as we can from Lord Denman's celebrated opinion. They reduce themselves to three, and may be thus stated: One is that water increases the fertility of the soil through which the water-course runs. Another is, that in manufacturing districts the value of the land is much enhanced by the existence of an unappropriated stream of water with a fall which may be utilized for manufacturing and other purposes. The third is, that, unless the doctrine which he lays down were adopted, "a valuable mineral or brine spring might be obstructed from the proprietor in whose land it arises, and converted to the profit of another."

So far as the third reason is concerned, we dismiss it by saying that we think it is impossible for any man living to understand it.

So far as the enhancement of the value of the property by the existence of mill sites or water falls is concerned, that might have had force in England or Massachusetts, where, as we have said, the use of water, and the only use of water, was that which could be made on the course of the stream itself, and without any diversion thereof. But in considering the applicability of these rules to California, and the argument from convenience and inconvenience, which should determine the judges in deciding as to what should be the law, this has obviously no weight, or should have none. Whether the water is used on the course of the stream by the owner for the purpose of driving machinery, or whether it is taken somewhere else by the appropriator and used for a similar purpose, or for another purpose equally beneficial, surely can make no difference so far as the good of the community is concerned. And it does seem to us that the hardship, so called, of being compelled within a reasonable time to indicate his intention to utilize this water-power, is one not worth taking into account in the consideration of what should be the law governing a Commonwealth in its most important interest; that it is not well that a man, who has acquired the title or the possession of the bed and banks of a water-course, should be allowed the privilege of having that water run to waste, simply because he is unwilling himself to put it to any use whatever; and that all that any man, coming to acquire any portion of the public domain, can ask, especially in view of the declared and avowed intention and policy of the Government and custom of the country, is that, if he wishes to take it before any one else has done so, he simply, and in the usual method prescribed by the Code and our customs before the Code, indicate to the world his intention so to do, and follow up that intention with reasonable and proper diligence.

Then as to the fertilizing of the land by the flow of the water: We think that, when closely considered, your Honors will agree with us that it has rather been a figure of speech than any well founded, practical consideration worth the attention of the makers of law.

Outside of the swamp lands in this State, as we think your Honors must have observed and well know, the fact of the flow of an unused stream of water through the land of any proprietor in California does not add

practically anything whatever to the value or fertility of the land, unless it be taken out of the channel; and rarely can this be done within the limits of any one holding. We know by observation that the practical result of the flow of these streams, when they do flow in this State, is simply to cut out a gully or depression in the land, and that it does not fertilize the land or in any manner increase the vegetation thereon. A few useless, worthless trees, a few willows or shrubs, may spring up along this gully or depression; and that, we think you will agree with us, is about the sum and substance of this great benefit from the unutilized flow of one of the California streams through any of the California farms.

Again, and this is a peculiarity of our water-courses, except in the rainless belt, when they do flow in any volume, almost as a rule without an exception, it is at that season of the year when there is an excess of moisture everywhere, and when there is more water than is needed or can be used for any purpose whatever. And in the times when, even if they could be taken from the streams and utilized on the adjoining lands, they might be of some value, almost invariably these California streams are dry and nothing is left but the bed of sand where they did flow.

In the swamp lands, it may be said, and is said in this case, that the natural and undiverted flow of the water is of value to the land. This is much dwelt on by counsel. In truth, it constitutes about the only equity they pretend to set up. They say that it would be most unjust, after they had acquired a piece of land, swamp and overflowed land, that a subsequent appropriation, the effect of which is to render that swamp land an arid desert, should be lawful; that that cannot be a fair and just rule which allows one man to convert his desert and unproductive land into a fruitful garden by the application to it of water, the very diversion of which renders the hitherto valuable land of another itself an arid waste. But how does the natural flow of water fertilize and increase the value of swamp and overflowed land? The very criterion of such land, the very reason why it was granted to the State by the General Government, and the condition of the grant both from the General Government to the State and from the State to the purchaser, is that there was an excess of water upon that land. The object of the grant, and the object of the sale, was to get rid of this excess of moisture, presumed, and conclu-

sively presumed, to be hurtful and noxious to the land. As a matter of fact, aside from the presumptions of law, the application of the modern common law rule of allowing all the water to flow as nature has made it flow, is and necessarily must be destructive of the whole value and utility of both the land and the water.

It is said that the swamp and overflowed lands are fertilized by the natural flow of the water. Is it not rather the fact, that by the natural and undiminished flow of the water, instead of being fertilized, they are destroyed and rendered unproductive until reclaimed? They are granted in order that the natural flow of the water, which is a nuisance upon the land, shall be taken away from the land, that the land may thus be rendered capable of cultivation and use. It is no answer to this to say that to take away all the water, the excess of which only is hurtful and noxious, would be to destroy the object of the grant. The point here is, that the application of the common law rule would, equally with the extreme application of the law of appropriation, condemn the land to absolute disuse, and deprive it of any productive qualities. The evidence in this case comes in aid of general observation on this point. It shows, it is true, that in a state of nature this body of swamp land produces a growth of tules, which in certain seasons of certain dry years is valuable as pasturage for cattle. But it also shows that, even with all the diversions which all the canals mentioned in the pleadings and proofs in this case at any time have made or could make, this growth of tules, this natural vegetation, would be better, more valuable and more useful, than it would be if all these canals were destroyed, at one swoop, and the water allowed to flow as in a state of nature. The evidence is clear, that while perhaps an excess of water flowing over this swamp would produce a ranker growth of tules than the residuum and the percolation left after all the appropriations set up, yet that, even in the driest year, and even after all the diversions complained of have occurred, there is a better growth of tules than in the wettest years and with all the useless moisture left upon the land.

If you prohibit the use of all these canals above the swamp, if you insist upon the natural common law flow of the water undisturbed and undiminished on the swamp, in the light of the evidence in this case, as well as by common observation and knowledge, what is the necessary and inevitable result? That in every year, except exceptionally dry years, years of drouth, the

whole of this swamp land from one margin to the other and from Buena Vista Lake to Tulare Lake, so long as the inlet to Buena Vista Lake is stopped up, will be covered over from side to side and from end to end with water. You would have then in Buena Vista Swamp, as you would have in Buena Vista Lake, if the forces of nature were left to their undisturbed operation, another lake, longer and wider and shallower than Buena Vista Lake, and, through the stagnant waters which thus would be allowed to flow over and accumulate on this swamp, you would have this growth of tules upon which the cattle might feed after the waters had so subsided that they could penetrate the swamp without being bogged and destroyed by reason of the accumulation of water upon it. But take away all that all the appropriations claim to take, and the result is not as counsel portrays—the change of this productive swamp into an arid waste—but the simple improvement of the vegetation by reason of the shorter growth of tules, sustaining an equally large body of stock.

In this case, as in the case of a regular water-course flowing through land which is not swamp-land, the same truth manifests itself; the same law of nature and of climate prevails: that, throughout California, water is and can be of practical use only when it has been utilized by labor and by appropriation; whilst in its natural and undisturbed flow is not a thing of value at all. As it may flow through the uplands, in the gullies which it cuts for itself, only a blemish upon the land through which it flows, so it may flow over and submerge the swamp and overflowed lands, in a state of nature being in itself only a nuisance, a swampy bog, breeding pestilence; the land only capable of being made productive by the appropriation of the water and its distribution and use under the hand of skill, by the efforts of labor.

It was for this reason, and for this reason alone, that the swamp and overflowed lands were treated and have been treated in the law as distinct and separate from the vast body of the public lands not swamp and overflowed. Because there was a hurtful excess of moisture upon them they were granted for the purpose of reclamation and upon the condition that the grantee should destroy, in the performance of his duty under the grant, the natural relationship between the water and the land.

The common law, as contended for by counsel,

declares that the water shall flow in its natural course; the legislation of Congress and of the State in relation to swamp-lands, on the direct contrary, declares that, in its natural condition, it is a nuisance and that it shall be diverted from the land. In other words, the common law as they claim it, declares that the diversion of water is a nuisance; the system of legislation with regard to swamp-lands declares and asserts that undiverted it is a nuisance.

Now, this is not the case of a party contending that where a natural water course flows through the body of swamp and overflowed lands the mere obligation of reclaiming that land, involves the right to destroy the water-course itself. If there is any water-course through this Buena Vista Swamp the boundaries of that water-course, as the evidence clearly shows, are the boundaries of the swamp itself. If there is any water course there, the whole swamp is the water course; and as the obligation was cast upon the grantees of the State to destroy that water course, to take that water from the land, it is perfectly clear that that obligation could not be fulfilled in any manner so as to leave undisturbed and existing as a water course, the broken and shallow channels which they have set up in this case as being the water courses. The evidence makes it perfectly clear that in no conceivable way could a system of reclamation be devised and carried out which would fulfill the conditions of the grant, and yet leave intact, as water-courses, these little channels which they have set up and upon which they have founded their whole claim as riparian owners. If further proof of this were needed, it is found in the conceded fact, conceded by all the witnesses, and established by all the testimony in the case, that the constant effort of those claiming the swamp lands in Buena Vista Swamp has been, not to take the water from the portions of the swamp outside of these threads of channels which they set up, but, necessarily, to take the waters from the whole swamp and again, in a different form and in a different way, to redistribute that water upon the swamp. According to their own testimony, these channels, even in so far as they are continuous, will carry without overflowing, not more than one foot in depth of water. When more than that comes it overflows the banks of these little depressions and flows over the swamp land indiscriminately and without course or regular defined order. Then obviously it is impossible to reclaim this land without, in

and by the very act of reclaiming at all, destroying every vestige and trace of the only thing which they set up here as a water course in the swamp.

From this it follows that they cannot complain of the diversion of the waters, which would naturally flow over that swamp, as constituting a nuisance, when that very diversion is the very identical thing which by the very condition of their own grant they have obligated themselves to perform.

But even if this were not so, consider for one moment the absurd results which must flow from the application of the appellant's claim of riparian rights to the land in this body of swamp and overflowed country.

We have seen that the Congress of the United States, in 1866, declared by statute that the waters on the public land should be the subject of appropriation, that all such appropriation should be maintained and perfected. By authority, as well as upon the plainest principles of construction, that statute was prospective as well as retrospective in its operation and intent. The very language of the statute demonstrates this. Because, in addition to the language which sanctions or recognizes and authorizes the appropriation of water, it declares, in so many words, that the right of way over the public lands for such canals and ditches is hereby granted, and provides—which plainly looks to the future, and not at all of the past—that if *in the construction* of any such ditch or canal the appropriator shall injure the possessor of the land, the settler upon the land, he shall pay to the settler damages for such injury. No possible construction can be put upon this language except that it recognizes the prospective nature and intent of the statute, and that it was intended to provide, not for cases which had already occurred, not for cases then occurring only, but to inaugurate a great and comprehensive system, and to look to the future, to the future operations and construction of works done under the authority of the statute.

When we come to the Code and legislation of the State, the intent is equally plain and apparent that it was the establishing of a system of law, the reasons for the inauguration of which looked equally to the future as to the past. Now then, when, after the statute of 1866 had been years in operation; after the Code had declared the law upon the subject as it has declared it; after parties under the invitation and express license of this legislation had gone to work to carry out the ob-

ject contemplated by the Government which passed it, how absurd to say that in construing a certificate of purchase for swamp and overflowed land, or a patent for swamp and overflowed lands, issued or passed after the passage of the statute, we shall construe the word "appurtenances" in the certificate or in the patent as carrying the common law riparian right to the flow of a water-course.

Here is a man who purchases from the State 40 acres in the middle of this swamp. The certificate or patent which evidences his right describes by metes and bounds the land which is conveyed to him. It also conveys, in the usual formula of the law, whatever is appurtenant to that land. And now it is contended that in a grant like this, of a small piece of land like this, situated as this is, under this word "appurtenances" is to be included in practical effect the power or dominion over 50 or 100 miles of the water-course above. It cannot be that under cover of this word appurtenances in such a grant as this, made upon such a consideration as this is made, you are to invest the recipient of the land with such vast and vague and undefined rights over the territory lying for hundreds of miles above the grant upon the stream. The thing itself is absurd and incredible, not only that the Government in parting with the title to that small piece of described land would do away with and destroy the whole system of appropriation which it has inaugurated, but that as a mere appurtenant to an insignificant subject matter, such as this is, it would convey such powers over the lands on the course of the waters above.

Just think of it for one moment. The man who pays one dollar an acre for a section of this swamp land gets not only the land described, but, on the theory of the appellants, gets the absolute power to come into a court of equity and to destroy the homes and the rights and the prosperity of thousands and thousands of parties situated above him upon the stream. It cannot be that such was the intent of the grant or of the law authorizing the grant.

In construing the pre-emption laws and the swamp land laws, is it not much more reasonable to construe them, not by the common law of England, but by the customs and usages and policy of our own State? That is the ordinary rule of construction applied to every contract, to every grant, to every statute; to construe it in the light of the then surrounding circumstances and conditions; to get at the intent and thought of the

law maker or of the grantor, by putting yourself as nearly as possible in the same situation which he occupied when he made the contract or passed the statute.

But when we come to consider the immensity of the interests which hang upon a correct construction of these laws, of these patents; when we come to consider that, not only in this case but in thousands of other like cases which have arisen, or may arise, the right to the uninterrupted flow of waters claimed as appurtenant to the land, involving the monopoly and absolute control of an element capable of fertilizing immense tracts of land, otherwise absolutely worthless; that with the use of this water under the principle of appropriation, the imagination can hardly set limits to the increase of population and of production which may ensue; when we consider that the amount of water flowing down Kern River, if allowed to be utilized under the principles of appropriation, is capable of almost indefinite extension in its use; that while to-day, and in the first application, it may fructify and bring into bearing only 100,000 acres of land, yet, by reason of the operation of irrigation each succeeding year, the land first irrigated requires less and the land behind it, otherwise desert, can be reached; when we consider that under the operation of this principle, in this way and by the application of this water, there is scarcely any limit to the development of this part of the State and the diversified and priceless products of the soil which can be produced under it; we see the full absurdity of the pretention that because the nation or the State, in pursuance of its general policy of alienating in small parcels the public domain, has provided for the sale of the land itself that therefore it has destroyed that very policy, equally fixed and rooted in its laws, equally wise, and rendered it a practical impossibility for the one policy to be carried out and made it certain that it will be destroyed by the operation of the other, when in point of fact and truth the two were in no-wise inconsistent, but the scheme for the sale of the lands was intended to and should go hand in hand, as a handmaid and as a help, to the other scheme for the fertilization of those lands when sold, by the appropriation of the waters on the public domain. The very soul, the whole inspiration of all legislation in this republic for the disposition of *public* lands, is the building up of homes, the civilization of deserts—not

into it the condemnation of vast tracts to disuse, which the perversion of that system of legislation by construing ~~it into~~ the strict riparian rules of law necessitates.

The appellants say, in order to break the force of this view of the case, that they do not claim the absolute monopoly of all this 50 miles of water course, the arbitrary power to fetter and control its utilization over all these desert wastes; but they only claim the right to the flow of the stream after other riparian proprietors immediately bordering upon the stream shall have had their proper use of it for purposes of irrigation.

Now, if the common law is to be applied and is not to be modified and changed to conform to, and rejected so far as inapplicable to our situation and condition, then, by that common law, they need not be so modest in their claim, but have a perfect right to claim the undiminished and unpolluted flow of the whole of the water, except in so far as diminished or used by riparian proprietors above for domestic and culinary purposes, and for the purposes of mill-sites upon the stream itself. That undoubtedly was the modern English common law, if that is sought to be applied here without alteration or modification. But the concession is made, because it can be made to break the force of our position and yet not to deprive them of all the monopoly they claim. In the first place, there is no evidence in this case, and the finding and fact is to the contrary, that there are any riparian proprietors on the course of this whole water-course above the plaintiffs except the Federal Government of the United States; and if they are going to admit the right of the upper proprietors to use the land for irrigation, if they concede the modification of the common law to that extent, in deference to the exigencies of our necessities, they concede away the whole of this case; because the Government, owning and being the riparian proprietor of all the lands above, would have, even upon the modified common law authorities, the right to exhaust the waters of the whole stream for the irrigation of those lands if they found it necessary to do so; and what the Government could do its licensees and grantees could also do, for the same reasons.

But, and what we think is of more importance in determining and establishing a grand principle, if the Government had sold all the quarter sections bordering upon this stream above the lands of these plaintiffs, their concession would practically amount to nothing.

It would be impossible for these owners of the sections directly bordering upon the stream, by any possible concert of action among themselves, much less individually, to utilize the waters of this stream only upon their own lands for purposes of irrigation. Nature does not work in that way. There is not the requisite fall, nor is the quality of land, to be found immediately bordering the stream, such as to admit of the profitable pursuit of irrigation under any such limitations and conditions as this concession imposes. And even if it could be done, of what avail would it be? Of what moment is it, in the discussion of a great question like this, that a few scattering settlers directly fronting the borders of the stream might, at great expense and inconvenience, irrigate land, which is not of the best, in a partial and not economical manner, solely for the purpose of allowing these owners of the swamp land who have agreed to reclaim it, to claim the right to more water than they can possibly use or put to any beneficial purpose.

It is not going too far to say that, for all practical purposes, we might just as well enforce and apply in California the rigid, unmodified, iron-clad modern English law of riparian rights, as to apply it with the simple modification that irrigation is a proper riparian use, and confine such use to the riparian owners bordering on the thread of the stream. We might as well say at once that the act of God in directing the courses of the stream is the law of California: that whom God hath thus joined together no man can put asunder; that the water must flow *ex jure nature* in the channel where nature placed it, and that it can only be used for domestic and culinary purposes and for the watering of stock and for the driving of machinery on the channel itself. Because the amount of irrigation which anywhere in California can be effected under the restrictions indicated, for all practical purposes, might just as well be denied as allowed. It seems to us, then, that, in view of the judicial history of California, in view of the decisions rendered by the Courts of the State and of the decisions rendered by the Courts of the United States on this subject, in view of the policy which has always prevailed amongst us and of our wants and necessities and the inapplicability of the modern common law rule, we must say that the patents of the Government and the State shall be construed with reference to the California and not to the English law; and that by the use of the word "appur-

tenances" in those grants there are not passed rights immeasurably greater than the principal thing granted. The maxim that the incident follows the principal—not the principal the incident—here fully applies.

But it is contended that the California decisions themselves have recognized this modern doctrine of riparian rights, and many cases are cited with a view of sustaining that pretension. We do deny that in building up the law on this subject in this State there can be found, as we would have expected to find, *dicta* and expressions in the *opinions* of the Judges and of the Courts which lend countenance and color to the pretenses of appellants. But we do say that the *decisions* on this subject in California, considered with reference to the facts, are all one way, and that there is no California decision which should stand in the way of this Court in rendering a judgment in this case and declaring a principle to govern this and similar cases in accordance with the imperious necessities and wants of this State. There may be found cases where the point has not been brought to the attention of the Courts, where the point was not involved, where the subject was not considered by the Court, where the circumstances were such that it mattered little as to how the particular and individual case was decided; but until now, and in this State, in no case has the broad question been presented for decision, and the reasons upon which that decision is to be made, urged before your Honors.

Now, the first case cited is *Crandall vs. Woods*, 8 Cal., 136. In that case, as we have said, Judge Murray, who delivered the opinion of the Court, and who was one of those California judges who always contended that they had but applied the common law, used expressions which, without considering them in connection with the facts before him, might be construed to be a recognition of the doctrine of riparian rights upon the public land. The case was an action for the diversion of water. The plaintiffs were using the water for supplying a town. The source was a small stream formed by several springs on Government land in the mining regions. The springs rose on a tract claimed by the plaintiff by virtue of a possessory right, dating from 1850. The claim of the defendants was based on a possessory right, dating from 1851, to a tract of land adjoining that of the plaintiff, and through which the stream flowed after leaving the land of plaintiff. It ap-

pears by the statement of the case, on page 136, that the water of the springs in the year 1851 ran *through the defendant's land*, and was *used by the owners thereof for irrigation and other useful purposes*. It did not appear that the plaintiff had ever appropriated or used the water at all at any time prior to the said actual appropriation thereof by the defendant. The defendant asked the Court to instruct the jury that if the defendant had located his land prior to the claim set up by the plaintiff to said waters, then defendant was entitled "to the reasonable use of said water, and to have the same flow through his ranch for agricultural and farming purposes, as against the plaintiff *subsequently* diverting the same," etc. The Court in the opinion (144) say that it did not appear that the *amount used by the defendants for irrigation* was so large as to materially diminish the quantity or render the supply inadequate to the wants of the inhabitants of the town. The *decision* was simply that the instruction should have been given. That is, in view of the fact of the prior actual appropriation and use of the water by defendant, he had the right to the use of the same for agricultural and farming purposes. The whole case stands well decided on the principle of prior appropriation as between appropriators. In the opinion it is said that since *Irwin vs. Phillips* appropriation as against a subsequent proprietor without title has been recognized, and that "if this is an innovation * * it is such as the *peculiar circumstances of the country* * * justify. * * If * * priority is to determine the right, it is difficult to see why the rule should not apply to all cases where land or water has been appropriated." The whole case is a recognition of the doctrine of appropriation, and the *dicta* in the opinion expressed merely the views of Judge Murray, who had dissented from the doctrine in *Conger vs. Weaver*, 5 Cal., 528, and who took occasion to say in *Hill vs. King*, 8 Cal., 238, that he yielded to a majority of the Court against his own opinion, in holding that the legislation of the State amounted to a judicial license to all to appropriate the waters; and further, that he thought this right of appropriation might be maintained on the ground that the appropriator is in fact and in law "a riparian owner," and as such his right may rest on the *older English authorities*. And so he puts it in *Crandall vs. Woods*. The result is the same, whether the right of appropriation be treated as an innovation or as simply the application of the old English common law.

That this is the correct view of the case of *Crandall vs. Woods*, is made perfectly clear by a consideration of the late California decisions on kindred subjects. We cite them below, and here only add that they are utterly inconsistent with the idea that upon the public land, while the title still remains in the Government, any riparian right, as distinguished from the right acquired and measured by appropriation, existed and was allowed by the decisions in California. In almost all of those cases, notably in those we have cited below, the appropriator of the water was also, and in most cases necessarily, a possessor, an encloser and occupier, and an appropriator of a portion of the bed and banks of the water-course. In *McDonald vs. The Bear River Co.*, for instance, the party who appropriated the water for the purposes of a mill had also taken up a possessory claim of, we believe, 160 acres, including both the banks and bed and sides of the stream. Yet the decision there was, not that by virtue of his appropriation and possession of the banks and bed of the stream he became a riparian proprietor—not, as in the theory of the English law, that the water must be allowed to flow in its natural channel, *ex jure naturae*, but that although he had taken up the bed and banks of the stream as well as made an appropriation of the water for a beneficial purpose, for running his mill, his right, as against even a subsequent appropriator of the surplus water not actually utilized by him, were bounded by his appropriations and by his use of the water; that he gained and could gain nothing more by his appropriation of the soil and the bed and banks of the stream. And so throughout the California cases.

It would have been considered absurd, ridiculous in the extreme, in those early days, for any man to contend that after a ditch had been dug, so as to carry the waters of the Yuba River, for instance, from the Sierra Nevadas, hundreds of miles to supply distant camps and localities, a mere *pedis possessio*, an occupation and possession of the banks and bed of the stream below, could in any way have interfered with or destroyed that right. And equally absurd would have been held a claim on the part of such a squatter at any point on the Yuba River below to prevent future appropriations of all the unutilized waters of that stream upon any plea that under *Crandall vs. Woods*, he was a riparian proprietor, who was entitled to more of the waters of the stream than he had actually utilized and appropriated. Upon principle this must be so; if for no

other reason than because, throughout the California jurisprudence on this subject, ran the wise restriction that all appropriations of any constituent or element of the public domain, whether land, mineral, wood, water or anything else, were limited by the extent of the beneficial use thereof, could continue no longer; that, appropriations, the taking of any of these elements or any portion of the public domain, or of anything on it, were not allowed to be made for mere speculative purposes, but must be limited by the great principle of application to beneficial uses. To have admitted that the mere occupation or possession or appropriation of the soil, constituting the bed and banks of a water-course, gave title or right or the power to tie up and fetter any more of the water than, within a reasonable time, was devoted to a beneficial use, would simply have been fatal to the whole idea and scheme of that system. In fact, consistently with the recognition of any such principle of riparian ownership, there could have been no system of appropriation of water in California; because whoever sought to divert and utilize the surplus waters of the public domain, would always have been met by the claim of some squatter or miner on the course of the stream below, who had obtained a possession of a portion of the bed and banks. It is enough, however, to say, and it is self-evident, that the taking up of the land in nowise involves the idea of the appropriation of the water. It was the doctrine of California, as established in numerous decisions, that these various appropriations could co-exist; that one party might take up a piece of public land as a mining claim, another party take it up as a place of deposit for his tailings; and that whenever the objects were not so inconsistent as that they could not co-exist, the one appropriation would not defeat the other.

Now, then, it has been suggested that all the early California decisions can be explained upon the theory that the right of appropriation of water was only allowed because the title to the lands was in the Government, and as the Government did not complain and as no one else could complain, therefore there was no reason for applying the English common law doctrine of riparian rights; but that, so soon as the Government parted with its title to any portion of the water-course, the reasons of that rule of appropriation ceased and the riparian right at once sprang into existence as dependent upon and passing with the Government

grant of the land; and that as no prescription or Statute of Limitations could run against the Government, as soon as the Government conveyed to any individual a portion of the dry bed of a water-course from which the waters had been previously appropriated and diverted, all these riparian rights at once again sprang into existence and re-attached to the land, and the party who had appropriated them was compelled to turn the waters back to the land for the benefit of the subsequent purchaser from the Government. We contend that, however often in the early California decisions the circumstance that the land was still public and that no one had the fee to the bed and banks of the stream was adverted to, it in no degree constituted the basis or *ratio decidendi* of those cases. If the modern English riparian law is to be considered as having been the law of the public land, even if, in addition, we assume the existence of a license, a tacit license and consent on the part of the Government to the appropriation of both the land and the water, is it not clear that the moment a party under this tacit license of the Government goes below the head of the ditch of the appropriator and takes the actual possession of farming lands, for instance, on the course of the diverted stream, the rights of the appropriator must as effectually cease and determine as they would cease and determine by the passage of the fee from the Government to the man who takes up a portion of the bed of the stream below. If the issuance of a patent by the Government to a portion of the dry bed of a diverted stream invests the patentee, as an appurtenant to the land granted, with the right to recall the water before diverted, upon what principle, by what method of reasoning, can the very same result and effect be denied to a subsequent *pedis possessio*, taken, without title from the Government, of the same dry bed of the water-course?

If there is anything in the English law, it is that the party who gets the right to the land gets, as appurtenant to it, the right to the usual flow of the water, whether he gets the fee of the land or the possessory right to the land; and for the very same reason in each case the right to the water would be an appurtenant to the land. If the right to the water be appurtenant to the fee of the land granted by the patent of the Government, for the very same reason, and upon the very same principles, the right to the water must be appurtenant to the possessory claim to the land taken under the sanction

and with the consent of the Government. In either case, and in both cases, the argument is that the water belongs to the land, and that he who gets the right to the land gets the right to the water. Obviously in the application of this principle it can make no difference how he gets the right to the land. The only point is whether he has the right to the land, and if he has the right to the possession of the land under the license of the Government, he has the same right to the water that he has when he gets title to the land by the patent of the Government. For the same reason, it is obviously immaterial whether the patent of the Government is issued before or after the appropriation of the water. If the water necessarily goes with the land, it goes with the land as appurtenant to the patent granted after the appropriation, just as it goes with the land as appurtenant to the patent granted before the appropriation. To make a distinction here, we must hold, in the first place, that there was Government license prior to the statute of 1866, authorizing the diversion of water away from the land. Now, even if we assume the existence of such a license, we can only justify the withholding of the water from the land by the prior appropriator of the water, as against the subsequent possessor of the land, upon the theory that the license of the Government to appropriate the land is to be construed as not including within its scope the water as appurtenant to the land. But obviously, if we can construe the license of the Government to appropriate the land itself as not including, as appurtenant to the land, the right to the flow of the water, for the very same reason we must construe the patent of the Government and the pre-emption law under which this pre-emption patent was granted as also excluding, as an appurtenant, the right to the flow of the water. If the license to take up the land and farm the land does not include the flow of the water as appurtenant to the land, as a part of the license, for the same reason a patent and pre-emption to the land should also be construed as not including the right to the water. And, as that is true with reference to the land of the Federal Government, for the same reasons exactly it is true with reference to the lands of the State. We have the same State action, the same State non-action, the same State license the same State legislation, the same reasons controlling throughout in both cases.

The next California case cited is the case of *Ferrea vs. Knipe*, 28 Cal., 340. That is a pretty fair

sample of the rest. It was a controversy over a stream of water that flowed through the 25 acres in controversy in *Ferrea vs. Chabot*. The stream was about as big as a man's leg. It ran down over the land of Ferrea. Ferrea lived on that stream, being a riparian proprietor, as they say. He goes to work and takes all of that water, every drop of it, before anybody else put it to any use; he diverted it; appropriated it to the beneficial use of raising vegetables on his place. The water flowed so low on the land that he could only get it over about seven acres. On that seven acres, by lifting it up and going to a great deal of trouble and expense, he did manage to irrigate. That being the case, he having made this appropriation, being in active enjoyment of the water, the man above him, Knipe, goes to work and puts a dam in the creek to water his horses and cattle; and he builds his dam in such a way as not only to accomplish the purpose, which he could have accomplished without hurting Ferrea at all, but, through laziness or carelessness or something else, he builds it in such a way that it spreads the water out so that it nearly all evaporates and, consequently, none of it can get down to Ferrea.

That was *Ferrea vs. Knipe*; a case strictly in accordance with what we claim to be the California doctrine. Ferrea had appropriated the water, and he had a right to it. But Ferrea lost the case in the Court below. In this Court his lawyer said:

"The cases in this State have fully settled and affirmed the doctrine of appropriation of water by the erection of a dam and the subsequent use, as establishing a prior right."

Knipe's lawyer said: "Merely using the water of a stream for irrigation by a riparian proprietor is but the exercise of a natural right; and the plaintiff in so doing could not affect the natural rights of other riparian proprietors, either above or below him. In this case Ferrea did not use the water adversely to any one, because he did not infringe upon the rights of any one. His right to use the water came, not by prior occupancy, but as an incident to his land through which the stream ran. The defendant, as an upper riparian proprietor, had a right to stop and use the whole of the stream, if necessary, for watering his stock."

That is the doctrine that Knipe wanted to apply. That is one of the features of the application of this English doctrine to a case utterly different from all the circumstances which gave rise to the doctrine itself.

He worked out this absurdity: That although Ferrea had gone to work and appropriated this water and was raising vegetables, yet he had no right at all, as against the man above him, who, as a riparian proprietor, could cut off the water for his stock, could take it all, and destroy Ferrea's work altogether.

The Supreme Court of this State reversed the case. We can see very well how Judge Currey, not being familiar with the law in its application to possessory rights and mining rights, put it upon the riparian doctrine. He might just as well, and a good deal better, have put it the other way. Judges Sanderson and Sawyer, who did know something about these things, refused to take any part in the opinion Judge Currey delivered. The most we can say of this case, as of the other, is that it was correctly decided for wrong reasons given.

Next comes the case of *Creighton vs. Evans*, in 53 Cal. All that the record showed was an admission that the plaintiff was the prior possessor and the prior owner of the land, and that the water flowed through the land, and that, after the plaintiff had become the owner and possessor of the land and *had planted his crop, etc.*, the defendant diverted a portion of the water for the purpose of irrigating land off from the body of the stream. The Court below, perhaps because the points were not argued, instructed the Jury that, if the defendant had taken away a portion of the water, which naturally flowed over the land of the plaintiff, for the purpose of irrigation, then without any proof of actual damage whatever, the jury should find a verdict for nominal damages for the plaintiff. It also instructed the jury that, if, however, the defendant had diverted a portion of the water of the stream for domestic uses, in that case, unless the plaintiff showed actual damage, they should find for the defendant. The Court below drew this distinction: That the defendant who was not a *supra* riparian proprietor did have the right, so long as he caused no actual damage to the party below, to take a reasonable quantity of water for domestic uses, but he had no such right for the purpose of irrigation.

Now, there was one clear ground upon which the Supreme Court might have based its decision, reversing the case and ordering a new trial. Because the instructions were plainly contradictory; and because there was not a scintilla of proof in the record that the defendant had ever sought to apply this water to any-

thing but purposes of irrigation, and no proof whatever that he had applied it to any domestic use. So, the instruction was wrong as based upon a state of facts which there was no evidence to support. But the Supreme Court reversed the case and said that: It appeared upon the record that the defendant had no rights at all in the premises; that he was not a proprietor, not even a subsequent appropriator after the accrual of the plaintiffs' rights; but that he was a mere trespasser. The way they put it, it was a case where a party who has located a piece of land through which a stream flows and who has possession of that land *and is using the water upon that land*, brings an action against a party who does not even take the trouble to make an appropriation according to law but goes there and diverts water without any actual right whatever.

That is all there is in that case. But in the brief filed by the appellants, it was insisted and urged upon the Supreme Court that, as the facts were all admitted of record, they should direct the Court below, on the coming down of the remittitur, to grant an injunction prohibiting the defendant from diverting any of the water. The Supreme Court refused that prayer and limited their decision to a simple reversal on the ground of error in law contained in the instructions, and ordered the Court below to grant a new trial of the action; refusing upon those admitted facts upon the record to direct, as plaintiff's counsel requested them to direct, that the Court below should award an injunction sitting as a Court of Equity. The main fact, however, is that this, like the other cases, was a case where the prior appropriation of the plaintiff had been invaded.

Then comes the case of *Pope vs. Kinman*, 54 Cal., which was about this: The party complaining, there, was a claimant under a Mexican grant, claiming to have derived title from the Mexican government. He had not obtained his patent five years before the suit was brought. But many years before the suit was brought, the defendants, who were the riparian owners on public lands, above the granted lands of the plaintiff, had made an appropriation of the water and had been using it for a great length of time. The decision of the Supreme Court was that the plaintiff claimed title under the Mexican government, and that, as by the civil law there were certain riparian rights, as appurtenant to that Mexican grant, he still had those rights, and

the statute of limitations did not run against him because he had not had his patent for five years. So, without specifying what right the riparian owner had, but expressly saying "we will not state in detail what those riparian rights are or their extent," they simply affirmed that this party, claiming under the Mexican government, according to the principles of the civil law, had some rights as a riparian proprietor, which rights could not be taken away from him by an appropriation, or a prescription of less than five years after the issuance of the patent when first, according to the law of this State, he could maintain his rights in a court of justice.

Now, in this case there is no pretense of title to any except public lands. There is no claim under the civil law, and no question is involved as to the rights of water which passed as appurtenant to a Mexican grant. That case, therefore, did not involve the questions which alone are pertinent and necessary to be decided in this case. Obviously, if the plaintiff in *Pope vs. Kinman*, had, like the plaintiffs here, simply claimed by a grant from the State of swamp and overflowed lands, he could not ^{have} prevailed as against a prior appropriator of the water on the public lands above. That much at least is conclusively settled, by the *Osgood* case, in this Court.

The next case is the case of *Zimler vs. The San Luis Obispo Water Company*, 57 Cal., 221. In that case the plaintiff had actually herself made an appropriation of the water by digging a ditch and conveying it upon her land, where she used it for irrigation. In her complaint she sets forth that she had been the first appropriator of the waters of that stream which flows naturally over her land for which she had a patent; that the water was necessary for her purposes as an owner of that land; and that the defendant had afterwards, without right, diverted the water from her to her damage. The prayer of the complaint was for a judgment for damages in the amount she could prove she had been injured, and an injunction to restrain the defendant, *not from diverting water from her land, but from diverting the water so as to prevent its flowing through her ditch to the extent that it ought to flow by virtue of her prior appropriation*. And the decree in the case, following the judgment for \$600 damages, was a decree that the defendant be enjoined from preventing the water from flowing to the land of the plaintiff through her ditch as prayed for in her complaint. This confined the relief granted, as

prayed for in the complaint, to the right she had acquired by virtue of her prior appropriation. A decree in similar, if not identical terms, was so construed in *American Companies vs. Bradford*, 27 Cal., 368. This Court, in its opinion, said that the defendant "diverted the waters of said creek from said premises and deprived the plaintiff of the water *which she had been using* and "which was necessary for the irrigation of said land." As the syllabus and the briefs show, the attention of the Court was directed to, and the decisions concerned only the question of the construction of a recital in a deed and the estoppel claimed to arise thereunder.

In *Ellis vs. Tone* both parties insisted upon the application of the modern English doctrine of riparian rights, especially the appellant, against whom the case was decided. The appellant did not rely upon the doctrine of appropriation, and could not, because as a matter of fact the respondents, who gained the case, were the first appropriators of the water, and claimed, and in fact recovered upon the claim, that they were not only the first appropriators, but that the Statute of Limitations, even, had run in favor of their appropriation. The question here presented, was not presented to and could not have been decided by the Court; or if decided at all, could only have been used as one reason for deciding the case exactly as it did decide it.

In *The St. Helena Water Co. vs. Forbes*, this question of prior appropriation, or riparian rights, did not arise, and could not have arisen. The plaintiff, we suppose by the very frame of its application, asserted the existence of a riparian right in the defendant; and the question finally discussed in the opinion of the Court was: Assuming the truth of this assertion of the plaintiff, what was the nature of the right?

It may have been that the defendant claimed under a Mexican grant and a patent. Suffice it to say here, that the question of the existence of the riparian right was assumed on all sides, not controverted by any one, and the only question discussed by the Court was as to the character and nature of that right, assuming it to exist. Even if it had been alleged, and had been shown, that the right of the party resisting the condemnation was a right to the water by virtue of an appropriation thereof, it would still, and equally, have been subject to condemnation upon the principle declared by the Court in that case.

The Nevada cases, cited by appellants, go far beyond anything which is now contended for. They decide that an appropriation of water is defeated by a patent issued *subsequently* to the appropriation, even though the appropriation antedates the inception of any rights whatever on the part of the patentee. Hence, those cases have been repeatedly overruled by the Supreme Court of the United States and by the Supreme Court of the State of California.

The Osgood case, in this Court, is directly to the contrary of the Nevada cases, and follows the case of *Broder vs. The Natoma Water Co.*, in which the Supreme Court of the United States, the tribunal of last resort so far as the construction of the statutes of Congress is concerned, decided that the Act of 1866 did not operate as a grant of the right to waters theretofore appropriated, or thereafter to be appropriated, but simply recognized rights already existing, sanctioned a system already established, and, most pointedly, that the appropriators of water on the public domain were not *trespassers*, but that the very fact of their appropriation to beneficial uses gave them a *lawful* claim and a right *which the Government was bound to respect*.

It may be added, that in the State of Nevada there existed no such controlling reason for departing from the asserted doctrine of the common law as to water rights, as exists in this State. And especially it must be noted that at the time when these decisions were rendered the Supreme Court of the United States had not given the construction which they afterwards gave to the law of 1866, and had not declared, as they afterwards, in a series of decisions so positively declared, that the modern common law of England had never been in force as to the public domain in California and other States and Territories where the use of water for irrigation is an absolute necessity. Those State and Circuit Court decisions declared the modern English common law *was applicable*. Those subsequently rendered by the Supreme Court of the United States declared that it was *inapplicable*. Can it be doubted, that if the State and Circuit Courts of Nevada had had before them these decisions of the Supreme Court of the United States, with the same obedience to authority and precedent, those cases would have been otherwise determined?

We confidently submit, then, that there is nothing in any of the decisions relied upon by appellants, upon

which to found a claim under the doctrine of *stare decisis*, or to prevent this Court from deciding this case upon broad and comprehensive principles, and with a view to protecting, instead of destroying, the vast interests involved. In fact, as far as authority goes, the only authorities fairly in point are those cited by us from the Supreme Court of the United States, especially the Broder case and the Colorado case. Those being the only ones where, as here, the question arose between parties claiming, not under a Mexican grant, but solely as purchasers or donees and licensees of the State or Federal Governments, to have acquired portions of the *public lands*.

This question was directly presented in the Colorado case of *Coffin vs. Left Hand Ditch Co.* (11 P. C. L. J., 419). There the complaint alleged an appropriation in A. D. 1863. In the 3d, 4th, 5th and 6th answers referred to in the Opinion, the defendants (appellants) set up riparian ownership on the water-course below the point of appropriation—some of their titles antedating the appropriation. Thus, the 5th answer set up title by Act of Congress, being a grant *in presenti*, made July 1, 1862. The 4th answer sets up title by settlement on the 1st day of December, A. D. 1863, under the Homestead Laws, perfected by patent. The complaint also alleged an enlargement of the original appropriation made in A. D. 1870.

The only comment on or answer to this decision, seems to be an assertion that it was rendered in obedience to certain statutory and constitutional provisions peculiar to Colorado, and not existing in California. But your Honors will find, on reading the very clear and well considered opinion of the Supreme Court of Colorado, that it but applies principles equally applicable in California, and follows out, to their logical result, the rulings of the Osgood case in this Court and the Broder and preceding cases in the Supreme Court of the United States.

The provision of the Constitution of Colorado did not go into effect until 1876, and could not, by any possibility, have effected the rights of the parties in the Coffin case. It was, in substance, a declaration that all unappropriated waters are public property, and *dedicated* to the people, subject to appropriation for beneficial uses.

Our New Constitution provides that, "the use of all
"water now appropriated, or that may be hereafter ap-
"propriated, for sale, rental or distribution, is hereby

"declared to be a public use, and subject to the regulation and control of the State." And the statute passed to carry it out (Stat. 1880, p. 16), provides full and sufficient safeguards and penalties to prevent water appropriated being held for speculative purposes, and to secure the equal rights of all in its reasonable use.

As was held in the Coffin case, the Colorado Constitution was but the expression of what had always been the law of that portion of the country; was but a *recognition*, not a creation, of the right to appropriate. So, our Constitution is not only a recognition of rights acquired by previous appropriations, but gives the sanction of organic and permanent law to the exercise of such right *in the future*.

It therefore follows, that subsequent alienation of public lands will not substitute riparian rights for rights by appropriation. Because, first, the very recognition of and providing for continuing and future appropriations, is inconsistent with any policy of passing riparian rights with future sales and donations of public land; and second, the right of appropriating water for sale or rental, under the safeguards provided, is recognized as a legal thing, and not contrary to public policy.

There is nothing in the statutes of Colorado, any more than in its Constitution, to dispose of the Coffin case as in point here. It is true those statutes were construed to recognize appropriation as against riparian rights. But so, and for the same reasons, must the statutes of California. In fact we should make the statement stronger, for there was much more in the Colorado statutes to favor the view of appellants, than there is in our statutes.

Those Colorado statutes were evidently taken from and modeled upon the earlier California local statutes providing for appropriations and diversions for irrigation. In many of these we find the saving clause of the Colorado statute in favor of existing rights, or against "detriment to those located on the stream below." This was construed in the Coffin case, as it was obviously intended by our legislature, and as it was *expressed* in some of our statutes—for instance that applicable to San Bernardino, where the saving is against detriment to those using the water below. In all these statutes it is evident the intention was the same; and they all, both here and in Colorado, presupposed the law of appropriation as their basis. They are all inconsistent with the idea of the law of riparian rights.

This is made clear by the reasoning in the cases we rely on, and, if possible, clearer by other legislation, *e. g.*, Statutes 1875-6, (p. 548,) where the rights *theretofore* secured by prior appropriation are recognized. (Sec. 4 and Sec. 10.)

There is, then, it seems to us, no reason whatever why, at least except as to Mexican grants, this Court should not follow the Colorado decision.

In the Broder case it was necessary for the Court to go still further and to construe the patent or grant as not passing a portion of the identical land or thing described. But in the Coffin case, it was only necessary to hold that, as the statute of 1866 only "recognized as valid the *customary law* with respect to the use of water," that, as that customary law had displaced the common law, therefore "the right itself, and "the obligation to protect it, existed prior to legislation on the subject of irrigation. It is entitled to "protection, as well after patent to a third party of "the land over which the natural stream flows, *as when "such land is a part of the public domain."*

So, in this State, and with regard to State lands, as this Court said in the Osgood case, *the principle* of prior appropriation of water has *all along* been *recognized and sanctioned*.

Then, in a State where the *principle* of prior appropriation *quoad* certain lands, and not the principle of riparian right, prevails, where prior appropriation is the customary and only law, a statute is enacted providing for the sale of those very lands, and a patent issued under such enactments. Shall we construe such a statute as working a *repeal by implication* of the pre-existing law? This would be, obviously, contrary to the rule that such a repeal is not effected, if both the law and statute can possibly stand together. (*Vide*: 1 Black, U. S., 470; 25 Ind., 167; 2 Beas., N. J., 291). Or shall we say, with the Colorado Court, that the patent must be construed by the pre-existing law; that, so construed, full effect is given to every word it contains, and we avoid the working out of a radical change in public policy, and existing laws and principles, by a statute passed for a different purpose and with a different intent, and that, too, when every substantial reason for the continued existence of the old rule and policy continues in full force.

The provision in the Colorado Constitution *dedicating* the waters, is, like the others, but declaratory of the pre-existing law. By every requisite to a dedication,

California and the United States dedicated these waters. We have elsewhere cited authority to this point, and here only ask your Honors' attention to the question, whether every element of a dedication did not here exist?

Your Honors are asked, however, to go much beyond merely deciding that after a patent to the land, over which an unappropriated stream of water is flowing, has been granted, the patentee takes the full measure of rights given by the English law, far-reaching and disastrous as the results of even that ruling must be. You are asked to hold that from the moment the first payment is made, or even a certificate of purchase issued without any payment, the holder of such paper, for the smallest subdivision, is entitled to control the waters to their source; that, after that, neither the public, the State, nor the General Government can make any appropriation or use of any of the waters; that whilst the holder of the paper, even if he has paid the first instalment, may abandon at pleasure—is under no obligation to complete the purchase, the State and her licensees and grantees are bound. In other words, that such a certificate gives a “vested right.”

Even if the certificate is evidence against us that any payment was made, such part payment created no vested right. The cases relied on by the appellant, are those where full payment had been made and where nothing remained but the ministerial duty of issuing the patent, the performance of which, if refused, the Courts could compel by mandamus. The rule is stated in *Shepley vs. Cowan*, 1 Otto (91 U. S.), 330, where the Court say that “the settlement, even when accompanied with “an improvement of the property, did not confer upon “the settler any right in the land as against the United “States, or impair in any respect the power of Congress to dispose of the land in any way it might deem “proper. The power of regulation and disposition “conferred upon Congress by the Constitution only “ceased when *all* the preliminary acts prescribed by “law for the acquisition of the title, including the payment of the price of the land, had been performed by “the settler.” The case of one who has made only the first payment, does not fall within the reasoning of any of the cases where the right has been held to be vested, but does fall within the reasoning of those where the control of the State has been held to continue. For example: The holder is not bound to complete the purchase, nor can he compel the State to allow him to

complete it. As one of the cases puts it, he can have no specific performance—no mandamus, etc. There is no mutuality—no finality or binding force in the transaction.

If the pre-emptioner, who has built his house, and who has spent his money and labor in improving the land, who, even, has filed his claim, etc., has no "vested right" in this sense, much less should the holder of a mere swamp land certificate, especially when we consider that the latter, if he be held to have such a vested right, can indefinitely condemn such vast resources and capabilities to idleness. Because, the argument is that no appropriation can interfere with his right to the flow, and no statute of limitations can bar him until he gets his patent. That is, practically, he can stand there forever with his certificate, without using the water himself, and allowing no one else to do so. No matter how vast a flood comes down in the irrigating season—no matter how infinitesimal a portion of it, the technically and philologically defined *riparian* owners above can utilize, he, by merely delaying to make further payment, can tie it all up until he sees fit to sell it.

And here we must keep in mind the condition of this swamp and overflowed land, and the policy of the nation and the State with reference to it from the very beginning.

The contention of appellants has necessarily been throughout, not that the whole swamp constituted a water-course, but that there was and is a distinct and well-defined water-course through the swamp. The finding is against them on this vital question of water courses. But, even if it could be shown that we are wrong in asserting a conflict of evidence on this point, we apprehend, there is no room for disputing that the bed and banks of whatever water-course is there, are identical with the segregation lines of the swamp and overflowed lands—that, if there is any water-course, the whole swamp is the water-course, and therefore the United States is and always was the riparian owner of the whole water-course from Tulare Lake to the Sierras. This is shown not only by the testimony of our witnesses, but of many, if not most, of theirs.

The policy of the Federal Government, at the very least since 1866, as shown by express statutes, has been that of *dedication* and license to appropriators. By the Desert Lands Act, passed March 3, 1877, Congress, in so many words, declared such dedication, viz: "The water of all lakes, rivers and other sources of

"water supply upon the public lands, and not navigable, shall *remain* and be held free for the appropriation and use of the public for irrigation, mining and manufacturing purposes, subject to existing rights."

This but carries out the ideas of the Broder and Coffin cases as a recognition or "acknowledgement of *"a doctrine already existing,"* like our State statutes above quoted (Stat. 1875-6, pp. 548-9, Secs. 3 and 4 and Sec. 10) and many others, including the Code itself, which might be cited. For instance: Stat. 1867-8, pp. 112-13, Sec. 3, proviso to Sec. 4; Stat. 1863-4, pp. 89-90, Secs. 11-13. So, March 27, 1876, we find the same recognition by the State, the same acknowledgement of the doctrine of appropriation and repudiation of riparian rights (Stat. 1875-6, p. 500), when, in authorizing the improvement of King's River, it is provided that the grantees should not pervert the "use of the waters of "said river for mechanical, irrigating, or milling purposes or in any way *interfere with or diminish the flow of water into the canals already constructed,*" etc.

If, then, the whole swamp is their water-course, the United States is the only riparian proprietor, and, as such, has dedicated the waters and sanctioned the doctrine of appropriation; and we have its express license and grant by Acts of Congress to divert the water. But even were the United States not the riparian owner along the swamp, it certainly is the riparian owner of all the land above the swamp, and has licensed us to take all the water that it, as such owner, could dispose of or use; and this Court cannot interfere with the finding that our use is a reasonable use, for if the United States itself had done what it authorizes us to do, it would have been, as a question of fact, only a reasonable use by a supra riparian proprietor.

If, on the other hand, the unconnected, shallow, depressions and holes contended for could be deemed the water-course, then, as decided in the Iowa case (*Hocke vs. The City*, 57 Iowa, 454), even on modern common law principles the doctrines of riparian rights do not apply. And if they could, there would not be the slightest equity in the case of appellants on that hypothesis; for as to the whole swamp, except the sections lying immediately on this depression, or channel as they call it, the purchasers would have no right to the water, within any of the decided cases in England or elsewhere. It would be mere surface water within all the cases.

The appellants confessed, by striking out all claim for damages after an abortive effort to prove them, that in fact they have not been damaged or injured to the extent of one dollar. Now, as we are riparian owners above, or what is the same thing, have acted under the express grant and authority of the United States, which is, the riparian owners below must show actual damage in order to maintain any action. This must follow from the very allowance of diversion for irrigation as a proper use by a riparian proprietor. By a strict and rigid application of modern English law, any *diversion*, even for irrigation, might be said to be unlawful, therefore an injury to a right, therefore to import damage. Some judges have even gone so far as to say that, while questions may arise whether *detention* is reasonable, yet no one has ever mentioned such a thing as a reasonable *diversion*, for the very proposition assumes the right of the proprietor above to use the water for his own purposes, to the exclusion of those below. (10 Barb., 522.)

Of course no one would contend that that is law in California, though, logically, the admission that it is not, leads to the rejection of the whole modern English doctrine. But on that concession, a diversion for irrigation is *per se* no more unlawful than a taking for the wants of cattle, for driving a mill, etc.

Then, with us the question must be, as it is elsewhere in regard to *detention*: is the *diversion* unreasonable?—which cannot be if no damage is done by reason of it.

Thompson vs. Crocker, 9 Pick., 59.

Cooper vs. Hall, 5 Ohio, 323.

Indeed, it is not necessary for us even to make out any license from the Government, except a right of access—for even the writers who most strongly insist on the modern English rule, when they once admit the rights of irrigation, are of necessity forced to the further modification, if it be one, that flowing water is *publici juris*, in the sense that “all may reasonably use “it who have *right of access to it*.”

Wood., 2d Ed., p. 79, § 373.

In other words, while the use is confined to propelling machinery, etc.—to use on the channel—the ownership of the channel may be the test of right; where it is to be used for irrigation, as here under laws of Congress—on desert lands for instance—and away from the channel, the right of access is a more proper test. So, it is said in the note to *Embrey vs. Over*, that: “A diversion of a stream for irrigation which would be nec-

“*essary and rightful in Arabia or Utah, might be manifestly unjustifiable in England or New Hampshire, where the earth is usually watered by rain, and where the most profitable use of water is for water power.*” Consequently we have seen in Massachusetts that that use is made the primary and predominant one, just as irrigation is here, and *therefore*, in regard to mills, etc. there, the old common law doctrine of appropriation, as expressed by Tindal in England is retained. It is true, though Angell so states in speaking of Judge Shaw’s opinion in *Cary vs. Daniells*, he and other authors say the result was facilitated by the Massachusetts statutes in regard to mill sites, etc. But these statutes are not so inconsistent with the principles laid down by Denman and Story, as are the Federal and State statutes and the early California cases we have cited. Those principles, as stated by Story, are that “the natural stream, existing, by the bounty of Providence, *for the benefit of the land through which it flows, is an incident annexed by operation of law to the land itself.*”

But the statutes and decisions we have cited, ~~constitute~~ ^{statute} the law of these public lands. And that law does not annex the water as an incident to that land. On the contrary, as far as language is capable of expressing intention, it dis-annexes the water from the the land. It contemplates and provides for its use elsewhere.

In this very case, if we take the intention of Providence into account, it would be hard to say what land it intended this water should be permanently annexed to. For, all the evidence shows that from the nature of the country and the fitful and varying flow of the water, the river is constantly changing its course. If left to the operations of nature, this swamp would long since have ceased to be encumbered with the water. After the change to the channel of New River, as is clear from the evidence, and as we would know without evidence, the necessary and immediate result would have been to fill up the margin of Buena Vista Lake at its lowest depression where the river empties into it near Cole’s Crossing, so as to enable it to hold more and more water, and subject the surface to increased evaporation every year, until in a short time no water would reach the swamp. To prevent this, they put in an artificial obstruction at Cole’s, the object and effect of which is to make the water flow north instead of into the lake, and also

to prevent its accumulating deposit at the mouth of the river building up a wall to keep the water from the swamp. Even if in this way they could get a right to the flow, it would, of course, be a right, not *ex jure naturae*, but by appropriation, and by an appropriation subsequent and subordinate to ours. Besides, they have not pleaded any such right. Again, the testimony is that the only way the result above set forth, if natural causes and the will of Providence were left to their own operation, could be prevented, would be by another change of the river, taking it still further away from the upper lakes and making a new channel into Goose Lake, without touching the lands by which alone a riparian right can be here claimed.

We have endeavored to show, and have quoted from Cooley, Washburne and other authors, to the effect that the California *decisions*, as to water rights *on the public lands*, all go upon the doctrine of prior appropriation, and are inconsistent with the common law as it is now written in the books. But if we take the statements, in their *opinions*, that the California Courts have simply applied to new circumstances, the common law, the result is the same, and only shows that it was the common law as it existed and was laid down by writers of authority in the older books which we adopted and modified. In addition to the authorities already cited on this point, we wish to call attention to further quotations from writers of the highest repute, and ask the Court to compare them with the early California enunciations of the law, and to observe how singularly they correspond.

Starkie, in his work on Evidence (Vol. II, p. 909, 5th Am. ed. of 1834), says:

“The water of a running stream is *publici juris*,
 “which each successive proprietor has a right to use
 “in passing, but which is the property of no one; but
 “if one of such owners appropriates the water, by
 “applying it to a particular purpose, he has a right
 “to do so, provided he does not thereby prejudice
 “any other owner in his *previous use and appropriation*
 “of the water to other purposes. But he cannot do
 “this *to the prejudice* of a lower proprietor, who has
 “*already appropriated* the stream, or a portion of it, to
 “some particular use. * * Upon the same principle,
 “after a right has been acquired to use water for
 “one purpose, the owner has a right to use the same

“extent of water for a different purpose, provided he
 “does no prejudice to any other owner in his use of
 “the water. And as the individual right must be
 “founded on the appropriation of the water to a bene-
 “ficial purpose, the plaintiff, in support of an action
 “for prejudicing such a right, must allege and prove
 “such appropriation and use, otherwise he is not entitled
 “to recover.” It is added in the text: “But in the
 “late case of *Mason vs. Hill*, the Court, after great
 “consideration, held that an appropriation of less
 “than twenty years’ duration was not sufficient to
 “give a right to the appropriator against a lower pro-
 “prietor.”

As this edition was published here in 1834, and the case of *Mason vs. Hill*, referred to as an innovation, was not decided till 1833, we take it that the portion of the text prior to the reference to *Mason vs. Hill*, and above quoted, expresses the author’s view of the common law as it was understood prior to 1833. It was so cited by council in *Embrey vs. Owen*, 6 Exch., p. 358. It would seem that the addition to the text above quoted, commencing with the word “But,” must have been the work of the American editor, as the Preface shows that the American edition was a long time in preparation. The following extracts from the English notes (see “Notice to 5th Edition,” Vol. I), fortify this conclusion:

“Flowing water is originally *publici juris*; so soon
 “as it is appropriated by an individual, his right is co-
 “extensive with the beneficial use to which he appropriates
 “it. Subject to that right, all the rest of the water re-
 “mains *publici juris*. * * The proprietor of land,
 “over which a stream of water flows, is * * war-
 “ranted in using the water for the purposes of his bus-
 “iness, though it may be polluted thereby, or in en-
 “tirely diverting it, if such usage or diversion be not
 “prejudicial to the owner of any of the estates below, in
 “the manner in which they have have previously accustomed
 “to use the same. Any supposed intended use to which
 “the owner of any such estate may or may not here-
 “after apply the water is not, I think, sufficient to de-
 “prive any other person of the right such person has
 “of applying and appropriating the water to a beneficial
 “purpose. Every person has, I conceive, that right,
 “provided that by such application or appropriation
 “he does not prevent or disturb any other person from

“using the same, or enjoying the benefit thereof, in as full, ample and advantageous a manner as that other has done before.”

The notes also quote from the Digest to show that the civil law is in accord with the foregoing.

In Chitty's Pl., Vol. II. p. 786, Ed. of 1833, 6th American from 5th London, in note: “Running water is originally *publici juris*, and an individual can only acquire a right to it by applying so much of it as he requires for a beneficial purpose, leaving the rest to others, who, if they acquire a right to it by subsequent appropriation, cannot lawfully be disturbed in the enjoyment of it.”

In the edition of Coke's Reports, published A. D., 1826, the editors, in the notes, state the law exactly according to the old English and early California doctrine; *inter alia*, our principle that when a certain quantity of water has been appropriated for one purpose, the use may be changed, though not the quantity, etc.

4 Co. Rep., 88 note (a).

Lord Denman, in *Mason vs. Hill*, 5 Barn. and Ad., on page 20, in support of his repudiation of the law as laid down in Starkie, professes to state the civil law as holding that every one was forbidden to alter a public river to the *prejudice* of those who dwelt near, and for this he cites the *Digest Book 43, tit. 13*.

But in Kauffman's Mackeldey, vol. 1, p. 305, note (b), after stating the law as to *private rivers*, it is said: “The same principle applies to public rivers; hence, nobody is entitled to erect anything in or over a public river, not even on his own ground, whereby the course of the river would be altered so as to injure a neighbor and impede him in his former use of the water,” and for this is cited the same authority, viz., *Dig. 43, 13*.

“The case of rivers * * is different from that of the ocean * * as they are contained within banks * * they * * admit of property by *occupancy*.”

Rutherforth's Institutes, p. 74.

This agrees with Starkie, in restricting the limitation to an interference with a prior use or appropriation, and also shows the correctness of the construc-

tion of statutes, like some of ours, given by the Colorado case, where the language is to the *injury* or *detriment*, etc., of others.

In the 3d edition of Waterman's *Eden on Injunctions*, p. 232, in note, after stating the modern doctrine, they say: "It is not to be disguised that the doctrines of exclusive right founded on mere priority of appropriation, received, at one time, strong countenance from dicta of learned judges, *if not by direct adjudication*."

Now, when we come to compare these expositions of the common law with the early California jurisprudence, we find a most striking and complete concordance. It is not going too far to say that every one of the questions presented to our Courts, prior to the case of *Pope vs. Kinman*, finds its ready solution by the simple application of these wise and comprehensive teachings of the common law. It is not at all surprising, then, that we find our Courts, speaking through Judge Hydenfeldt, Judge Murray, Judge Sanderson, and others, declaring that they had not found it necessary to depart from the common law, but that all their decisions on the question of water rights in California might even have been placed upon common law reasoning and precedent. To reach this result, we have only to say, in strict accordance with all precedent, that in adopting the common law, we adopted it as known and declared at the time of our separation from the mother country, or that we adopted only such portions of it as were applicable to our situation, wants and necessities—suitable to the physical, climatic, business and social circumstances, local and peculiar to us.

This surely involves nothing radical or revolutionary. It is, on the contrary, the only conservative course and policy. There is nothing startling, or which savors of injustice in *retaining* a policy and system of jurisprudence, which, as applied to the public domain for over a quarter of a century in California, was, in its inception, according to repeated statements of Judges declaring the opinions of our highest judicial tribunal, but the conservation and recognition of the time-honored rules of the old common law, which we had taken as the basis of our laws, which, in England—from her infancy to her full maturity; from before the Norman conquest till long after the fall of Napoleon; through all

the stages of her growth and civilization, and until within the last fifty years—proved itself right and just, and wise and politic, and won the approval of such men as Hale and Tindal, and Starkie and Ellenborough, and others—jurists and scholars not inferior to any who have disapproved their decisions and writings.

In newer States, with like necessities to ours, such as Colorado, it has established itself in great measure, because of its intrinsic wisdom, symmetry and harmony, and because for over a quarter of a century in California it had proved itself the handmaid of enterprise, development and progress.

It is very true, and was most fortunate for California, that our first Judges had to deal with the question in relation to the public lands then hampered by no vested rights, and so were left free to apply the wiser policy of the early common law, without regard to later precedents framed with reference to different, or rather, opposite conditions. But how can the fact of the sale of portions of the public land furnish any argument for altering the law thus established? If we could presume the assent of the Government to the law first established, and from that assent imply and declare a governmental policy while the lands remained public, can we not, with equal or greater reason, from the express legislation of both State and Nation, uphold the continuance of that policy, and construe all patents and sales in its light? Especially when every reason for the preference of the older to the newer common law still holds good, and when not one of those reasons has any relation whatever to those which prompted the sale, or has lost any whit of force by reason of the sale.

The whole doctrine of appropriation, in all its parts and in every detail, is, as we have shown, taken bodily from the English law, as laid down in Starkie. It was invented and applied without the slightest reference to the fact of governmental ownership of the land. It was adopted by the State Courts of California in the same way; and the principles, upon which it was adopted and rests, have been so declared, in a series of decisions by the Supreme Court of the United States, as to demonstrate their absolute independence of the operation of the land laws and land policy looking to a distribution of the public domain among individual owners. In those decisions it is repeated and reiterated that the *principle* of appropriation was adopted here, *because* the modern English law was *inapplicable*,

not to the tenure of the land, but to the wants, condition and necessities of our people; because diversion to remote points was necessary where the use of water for irrigation and mining was an *essential*.

Now, from all this springs another consideration of the very greatest practical moment and magnitude. We are told in all these decisions that a *system of law* grew up among us, a universal custom, and that *upon the faith of it*, vast enterprises have been undertaken and carried on. This system having become *our* common law, a whole generation has been educated to believe in and to act upon it. It has interwoven itself into our whole industrial life. Was it not a commendable and reasonable reliance upon this state of things—upon this universal custom and belief—that has prompted this expenditure, this effort to utilize the waters on the public lands? Was it fair to expect that all this would cease, that the habits and customs of the people would instantly change whenever a pre-emption or a swamp land right was acquired or allowed? That men would stop before taking out water from any of the streams to go through several counties, down to the ocean, to inquire whether a certificate of purchase had somewhere been issued? Is it possible, that having thus, in good faith, expended their time and money for four years and eleven months without protest or objection from any, they must lose it all, at the instance of one, who, but for their success, would never have been heard from? How much fairer is it to say to such a one, you also know the custom and the law—you purchased with full knowledge that water on the public land was subject to appropriation. If you wished it, all you had to do was to take it. The world must move on, and the wheels of progress cannot be stopped to await your leisure and convenience.

The idea seems to be that there is a great injustice, in compelling a man who has bought a piece of public land over which water is flowing, to put it to some use or to allow some one else to do so. But this very principle is the breathing spirit of the whole system for the sale and distribution of the public domain. Its very object and intent is to give it only to those who will utilize and not hold it for mere speculation. Exclusive property in the land itself is only given because no substitute has been found; and by the policy of our revenue laws, the requisite pressure is applied to induce its improvement and use, by taxing improved and unimproved land at the same valuation.

But not one of the reasons why absolute ownership of land is tolerated applies in favor of this claim to unappropriated waters, flowing from a distance over a vast expanse of land owned by others and waiting to be fertilized by it.

Whatever may have been said by judges like Lord Denman—whatever may be true in other lands—here, in California, the natural flow of water in a water-course is a thing without practical utility. It is of priceless value when allowed to be diverted and made subject to the rule of prior appropriation; otherwise, for all practical purposes, it might as well be non-existent.

Much is said in the books about the precedence of what are called natural wants; that, however other great interests may languish, enough must at all events be left for household purposes, for washing, and drinking, etc. Now, as a matter of cold, every-day fact, nobody in California washes or drinks out of a water-course. Even those who are so primitive as to supply themselves by dipping and carrying the water, dig themselves a well for that purpose. In most streams there is no flowing water part of the year, and the balance there is a muddy flood. And in the few which are perennial, it would be utopian to think of so restricting the owners above as to preserve the requisite purity for household uses. We think we might venture on the assertion that no member of this Court knows of a household in California which is supplied with water for household purposes, even by means of an expensive reservoir and piping, etc., from a *flowing stream* on the banks of which there is more than one riparian owner. Even if it could be utilized in that way, the act of user implies an appropriation, and there is no reason why, like every other act of appropriation, it should not be subject to the rule, *qui prior est tempore*, etc. The government, in selling, makes no distinction in price, and, so far as the public welfare and policy is concerned, it is indifferent whether the water be piped to a house on one parcel of government land or another. The true interest of the State is to help those who help themselves—*vigilantibus, non dormientibus*.

The same observations apply to the other *riparian* uses on which so much stress is laid. But, here, the use of irrigation is the paramount use, and to that the argument in favor of the law of appropriation applies *a fortiori*, and with overwhelming force.

It is repeated over and over in the books, as the

main reason in favor of the modern riparian rule, in support of a policy which allows the owner on the bank to claim the full flow, whether he can or will use it or no, that he is, in contemplation of law and in spite of himself, always using it, if in no other way, by being the passive recipient of the resulting fertilization of his soil. But, at least in California, so far as technical water-courses—streams of flowing water with definite and well defined banks and bed—are concerned, this is a fanciful abstraction, and not a substantial or economical truth. So long as the water continues to flow within its banks, it does not and cannot, for any practical purpose or good, fertilize the soil. For the infinitesimal distance to which it can penetrate the soil all the year around, or during such usual and accustomed flow as is requisite to constitute a water-course, it destroys, instead of producing any useful growth. A line of straggling, worthless willows may mark the line of the flow, but to grain, or vines, or alfalfa, or vegetables, etc., such an excess of moisture is as fatal as the deprivation of all moisture. To employ our waters for irrigation, the application of intelligent labor, engineering and supervision is a condition precedent; but when thus appropriated, diverted and applied, what has already been done proves that the imagination can hardly conceive the immensity of the blessings it may be made to confer. The same stream which, if confined to the uses, or fettered by the caprice or inertia of those owning lands on its immediate border, would continue to flow through the thinly settled, straggling and half-cultivated or uncultivated ranges, can be conducted wherever over the broad expanse of the State the unerring instinct of capital and enterprise perceives it can be most profitably and usefully employed. That which requires the first year a great deal of water, each succeeding year requires less; and so the fertilizing wave passes on, leaving behind it busy towns and green fields, and prolific vineyards.

To restrict the use *for irrigation* to the owners immediately bordering on the stream, is to apply a technical rule where the reason entirely ceases; and so we find even in the class of cases relied on by appellants, e. g. *Embrey vs. Owen*, 6 Ex. p. 368: "All may use it who 'have a right of access to it,' speaking of irrigation; and p. 361, Lord Kames is quoted to the effect that not only those who have land adjoining, but every in-

dividual of the nation is entitled to use the water for his private purposes.

It may be that the evidence in this case sufficiently shows the practical operation of such a rule as appellants contend for; but common observation is enough to justify the wisdom of the license for extended diversion given and sanctioned, so far as the public lands are concerned, by the State and Congressional legislation, policy, action and non-action, and by the decisions of both the State and Federal Courts. As conceded by counsel in *Embrey vs. Owen*, p. 363, in regard to large streams like this, such a modification is one which the sovereigns here, owning the public lands, might well have adopted.

It matters little whether *Mason vs. Hill* changed or simply declared the common law. If the former case, our early decisions simply adopted and followed the old common law. If the latter, the judges simply committed an error in declaring, as they did, that the doctrine of appropriation, which they undoubtedly applied, but followed the old common law and applied it to the condition of things existing here. The fact remains that by judicial interpretation what Starkie and others had written as the common law was accepted as being our common law. And an unbroken series of decisions in the Supreme Court of the United States during the last ten years has declared that the law of 1866 (and *a fortiori* our Code) was but a legislative recognition of what had always been the law in California. But the law of 1866 also applies to future appropriations and, by the proviso, expressly grants the *right of access* over public lands subsequently patented. This was followed up by the Desert Land Act, which we have quoted, another *recognition* of what had always been the law, but in the clearest possible language *reserving* and *dedicating* all the waters on public lands for the use of appropriators diverting it and conveying it to a distance for irrigation and other beneficial purposes. Mr. Yale says the act of 1866 "confers the right of way to construct "ditches and canals *after* the passage of the Act, by "necessary implication from the language used in the "proviso, saving the right of settlers from injury to their "possessions. The right is as freely conferred as if the "Act used more direct language. The intention is "quite as fully manifested as if the legislative expression was more accurate." (p. 211). And (on page 380) he shows what he means by saving the rights of settlers, as is plain from the statute, namely, that if in-

jured they have a right to sue for the damage to the land.

The stream here in question, is but a sample of the important California water courses in this regard, all testifying to the wisdom and necessity of this State and National policy. If your Honors could go from the Rio Bravo Ranch down to the Buena Vista Lake along the course of Kern River, and thence along the swamp to Tulare Lake and below, even at this late day in the history of the settlement of this region, you would end with the conviction that the whole thing was not worth the cost of a lawsuit. To appreciate the value of the interests involved, you must leave the course where, it is said, a beneficent Providence guided these waters—quit the barren and shifting sands, and willows above and the hog-wallows below, and get away from the “water-course” to the orchards, pastures and vineyards and wheat fields to which the waters have been conducted.

But even if the lands immediately on the stream were the most suitable for irrigation, it is evident that to confine the use of the water to them is to condemn them, in great measure, to disuse. The most skillful engineer could not devise a financially possible or economical scheme under such a restriction. In the first place, even if there was fall enough, and such a miracle had occurred as that the land on the borders lay so as to be capable of irrigation, as it is practiced and must be carried on, the quantity of land thus within reach of any canal running parallel with and in close proximity to the stream would never repay the outlay, and necessarily, except in seasons of extreme drouth a great surplus of water must be allowed to waste back into the stream. For, as we understand the contention, any holder of a certificate any where below, even below Tulare Lake, could at any time, at his pleasure, enjoin any diversion of the surplus for use upon what they call non-riparian land. They say every body above, except riparian owners holding quarter sections immediately on the river, are mere trespassers if they dare to use any of this water, whether they need it or not. And even if they would graciously recede from this extreme position, and admit that outsiders could use the surplus, still the concession must, on their views, be a perfectly barren one, because they say they are not compelled to make any appropriation or put the water to any use until they get ready; and, of course, no outsider would even ven-

In *Griffith vs. Jenkins*, 2 Allen, 589, the pleadings were like ours. Counsel for plaintiffs argued that they could recover without proving the existence of an open water-course in the swamp, and requested the Court to rule that they were entitled to recover for any diversion of water from the swamp, whether a water-course had been proved to exist through plaintiffs' land or not. But the Court held it was necessary for plaintiffs to show disturbance of a water-course *of theirs*, etc. This was affirmed, the Court, by Bigelow, C. J., holding that the allegation of the existence of the water-course in the swamp was *essential*.

the ownership of the bed, as we have quoted from uncontradicted authority (*Woods on Nuisance*), would give them no riparian rights. The owner of the bank would still retain the right to use the water; and we are the agents, licensees and grantees of that owner in making that use.

But here, again, they say it is a hardship, even if the whole swamp is the water-course, for the riparian owners above and below to deprive them of all benefit of the water; and that by purchasing the bed and putting their cattle on it, they have actually used and appropriated *so much of the water*.

But no such claim has been set up in the pleadings, or can be supported by any proof. They brought their suit on an entirely different theory, that of strict, technical riparian right.

Even if the claim could now be shifted, by all the authorities both English and American, in the early common law and in the California cases, the appropriator who sues must allege and prove actual damage. As his claim rests on appropriation, and is limited by beneficial use, he must show a deprivation of that use. He cannot, like the riparian proprietor, fold his hands and say any division is an injury to his right and imports damage. All he is not putting to a useful and beneficial use any one else may take, and consequently no action can ever lie except on proof of actual damage.

As matter of fact, plaintiffs made no appropriation whatever; took no possession even; but their cattle went into the swamp just as did every body else's cattle.

Again, the proof is, our appropriation did not injure their swamp for the only purposes they even pretended to put it to. This they themselves affirmed and confessed in the strongest possible way, by withdrawing their claim for damages and admitting they had suffered none. For, if they had been using the swamp as a pasture, and we had injured it, they would have been easily able to prove the amount of the damage. It is enough to say on this head that the finding, based both on evidence and their own confession, concludes it.

It should, we think, however, be put on broader grounds. Conceding, only for the sake of argument, that there was a water-course below Buena Vista Lake, either it consisted of the whole swamp or only of the small channel or depression, or series of holes or depressions claimed by them within the swamp. If the former, then there is a fatal variance, because not only did they rest their whole case, both in pleading and proof, on the opposite theory, but it was necessary for them to do so. If they had alleged that the whole swamp was the water-course, and that they owned nothing but the bed, and that we owned the banks, they would have stated themselves out of Court. Such a thing as the owner of the bed of a water-course, suing the riparian proprietor, or his grantee or licensee, was never heard of. It is contrary, not only to the express authority we have quoted, but to the whole theory of riparian rights. In such case, on the doctrine of the cases relied on by appellants, it is the owner of the bank who has the right to the full and undiminished flow of the water, and he could sue the owner of the bed for the slightest interference with it. Besides, the latter would have no right of access. But, suffice it, that that is not the case they alleged or endeavored to prove.

Then, on the other hypothesis. They have the water-course in the swamp, and some small pieces of riparian land and larger disconnected parcels in the swamp. (We speak here of their certificate, not their patent land which our appropriation antedates.)

Now let us see what their equity and claim is. Their land is watered, they say, and made good for pasturage. But how? Not, surely, by the water-course. That, as and in so far as it is a water-course, might flow there forever without doing them any good, except that their cattle might drink out of it. The most they can claim on that score, then, is that we must not deprive them of the quantity of water they have appropriated for

ture to invest his time and money in appropriating at the risk of being enjoined at any time within five years by any and all of the riparian proprietors below all the way down to the San Joaquin River. Nobody could tell in advance what they would claim or how much they would prove they needed, or when they would take out their patents, or how many certificates would be assigned and tacked together to make a long strip of riparian land, as has been attempted in this case.

However, as we have endeavored to show, in this case these difficulties may not arise. For it is only *riparian* owners—that is those owning the *ripa* or bank, who can set up these ultra claims. And here, fortunately, on this record, the United States is the only riparian proprietor. If plaintiffs owned the whole swamp, and the swamp were the water-course—which it is, if there is any water-course below Buena Vista Lake—the ownership of the bed, as we have quoted from uncontradicted authority (Woods on Nuisance), would give them no riparian rights. The owner of the bank would still retain the right to use the water; and we are the agents, licensees and grantees of that owner in making that use.

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watering their stock. That there can be no pretence we have done. In so far as the tules have been made to grow, that depends solely on the overflow of water outside of and independent of any water-course, or upon seepage and percolation equally independent of it. Their own case, as well as the evidence and findings, necessitate this conclusion, and admit of no other.

Now, surface waters, not being a water-course, like percolating waters and seepage may possibly be advantageous to the land they flow over or under, if they only come seldom enough, merely to irrigate and don't stay long enough to kill vegetation, or injure it, as by making the tules too rank. As a rule, these surface waters are a nuisance to the land, and the getting rid of them—their diversion—instead of being a nuisance is a benefit; whence the condition upon which all swamp and overflowed land is granted by the United States and held and sold by the State. But beneficial or noxious, it was never heard of that it was actionable for proprietors above to prevent their coming to the land below, by acts done on their own premises above.

Here is a long, level swamp, through which they say is a water-course, as riparian proprietors on the banks of which all their rights depend. On this their whole case hinges. At the most, according to the testimony of Mr. Crocker himself, this water-course is capable of carrying a stream about one foot deep.

They say the watercourse is distinguishable from the rest of the swamp in that, in the watercourse, nothing grows; that outside, there is a growth of tules. By all the testimony, outside this asserted watercourse, there is nothing which answers in any one feature to any definition of a watercourse ever given; it is not flowing water; it is not confined in any definite or other channel; has no banks, no usual or accustomed flow, and no current. It is not worth while to stop to cite authority for the proposition, that no action lies for acts done elsewhere, as causing a diversion of this water. We presume it will not be controverted.

Angell says: § 108 (o)

“It is only when the flow of water on one person's land is identified with that on his neighbors, by being traceable to it along a distinct and defined course, that the two proprietors can have natural relations with each other in respect of it, considered as the

“subject of separate existence. If the waters on the two lands do not possess this unity of character, they are in the same category as fish, birds., etc., and are only incident to, and form part of the produce of their respective soils *while actually resting upon them*; no proprietor can make claim to water in such condition before it arrives within his own borders.” * * Sec. 108 (r). “Every land owner has the rights to appropriate surface water which flows over his land in no definite channel, although the water it thereby prevented from reaching or connecting itself with a water-course which it had previously supplied * * He cannot, it is true, do so *if the water has arrived at, and is flowing in some natural channel already formed*. But he has a perfect right to appropriate it before it arrives at such a channel.”

S. P., Washburn on Easements, 464 (7).

In the case of *Macomber vs. Godfrey*, cited by appellants, stress was laid upon the fact, that after the stream widened out it again resumed the character of a water-course with definite banks, etc.; that it had a regular and natural flow from a permanent source; and that its usual course was in a channel, with a well-defined bed and banks, and neither upon the land of plaintiff or of the defendant did it entirely lose this character. * But here, so far at the very least as this surface water is concerned, the facts are quite different. After it leaves Buena Vista Lake and Kern River, it is nowhere a water-course and is merely surface water. It never again forms part of a *definite or a flowing stream*. It follows by all the authorities, and upon principle, and in reason and justice, that the riparian law is not applicable. Being surface water, each owner has the absolute right to do what he pleases with it after it goes on his parcel and has no easement or right in connection with it until it gets there. Just for the same reasons that, if, as under our present Constitution, the whole swamp has been disposed of in small parcels to actual settlers, no one down on the borders of Tulare Lake, or below Tulare Lake, could complain because the owners and purchasers above had drained this water off their land, so the owners above cannot complain because parties at Buena Vista Lake or above it made such diversions as to prevent its ever reaching the swamp at all. It has been repeatedly urged in the reported cases, as it is here, that this

* It is also to be noted that in the *Macomber* case, (and in all other cases of that kind cited by appellants), the party owned the *whole stream*, including the bed and *the banks on both sides*—not, as in this case, merely a *part of THE BED*.

violates the equities of parties who have purchased the moist lands overflowed by the surface waters, but the claim has always been denied; and the same has been the result in case of percolating and subterranean waters.

The distinction between the riparian right to *flowing* water, *in a water-course*, and all other rights to water, is plain, and is recognised by all decisions and writers. *After*, and not before, this element has reached and become part of a regular water-course, riparian rights attach to it; and by the modern authorities these *imply* certain rights in the land of others both above and below. These rights are in derogation of the rule, and constitute, in fact, an *exception* to the rule, that each owner has plenary and absolute dominion over his own land from the sky to the center of the earth. The only case which falls within the exception is that of a definite water-course. The owner above, for instance, is obliged to lend the use of his land as a channel for the flow of the water-course; he is under no obligation to furnish a support or means of access or flow for surface or precolating water, or for anything except water which *has already reached* and is *flowing* in a technical water-course. When water is *either not flowing or running* water, or is not part of a water-course, it is part of the soil and belongs absolutely to the owner of the land on which it is found; when it is *flowing* in a water-course no one has a property in the water, according to modern common law, but only a right to the flow, more or less qualified. This is well formulated in the N. Y. Code above quoted. "The owner of land owns water *standing* thereon, or *flowing* * * but not forming a definite stream."

So Washburne, on page 278, says: "To maintain the right to a water-course or brook, it must be made to appear that the water usually *flows in a certain direction*, and by a *regular channel with banks or sides*. * * Wherever there is a steady uniform current of water, it constitutes a river, though *this does not include a lake*," etc.

And Woods, p. 428: "Neither does the fact that the land drained is *wet and springy*, so that in most seasons the water rises to the surface and flows off upon the land of another, thus supplying him with water for domestic or manufacturing purposes, make any change in the right or liability of the owner of the upper estate, if the water assumes no definite

"channel, but spreads itself over the surface of the soil and squanders itself there."

Kent says, (vol 3, 439): "Every proprietor of lands on the banks of a river has naturally an equal right, etc., to the use of the water which flows," etc.

"Wood (p. 343): "There is no special property or ownership in running water; * * * even when upon the surface in a state of inertia it is the property of him who owns the land." And (p. 352): "The mere ownership of the soil over which the water flows gives no special or beneficial interest in the water. It is rather the ownership of the banks on either side of the stream that creates and upholds the right."

So, in case of a pond, Chief Justice Shaw says: "Water taken from the body of the pond, before it could ever reach the outlet, never could be water flowing from the pond by or to complainant's mills," etc.

Cummings vs. Barrett, 10 Cushing 187.

In case of a lake which at times overflows, or a pond, or a marsh, or of any other water not forming part of a definite water-course, any supra-proprietor—in fact, any person whatever, whether proprietor or not, while he cannot, according to modern riparian law, appropriate such waters if it has arrived at and is flowing in some natural channel already formed, still "he has a perfect right to appropriate it before it arrives at such a channel."

Broadbent vs. Ramsbotham, 11 Exch. 615.

Rawstrom vs. Taylor, Ib. 602.

With the single exception of tule or swamp and overflowed lands, in California, there can be no pretence of any equity or justice in the claim to the natural flow of water; and the only reason why tule lands may seem to be an exception is that the waters thereon are not flowing waters, do not form part of any water-course, and hence are not within the authority or principle of any of the riparian cases. The owner of lands, even on those riparian rules, can only sue a man for a diversion effected by acts done off the land of plaintiff, on proof that the diversion was of the water of a definite water-course of which he owns the banks. In California, such a plaintiff can show no equitable or just claim, because water in a water-course is only here valuable after being appropriated—after, by artificial means, it

has been utilized. While the water remains in the water-course—if allowed to continue its flow therein—it makes nothing grow; irrigates nothing. In the only instance when it can be said *naturally* to irrigate the ground, it is because it has squandered itself over the surface; has ceased to be *flowing* water—has no banks; and then it ceases to be governed by the only rules of law, by reason of which its diversion above can be complained of. Even if the allowing one's cattle to feed on the tules could be held to amount to an appropriation of such standing and surface waters—even if the whole policy of appropriation is to be set aside for such a claim, there is no common law to sustain it; no connection between the land where the water stands, and the land above, on which it is diverted.

It must be kept in mind that we are discussing the construction of statutes and other acts involving great matters of public policy and concern; endeavoring to lay down great general principles to be applied to the development, ownership, and control of elements infinitely more precious and important than all the gold and silver ever extracted from, or still in, the mining regions. In favor of those mining interests, to a certain extent, the rights of farmers and graziers were made to yield. But there was much more equity in the claim of the grazer, whose pastures were dug up by the miner, than in that of the holder of a swamp land certificate, who insists that in order that his cattle may for a portion of the year browse over a portion of these tules, all improvement for one hundred miles above shall cease. Both the State and the United States, when they substituted the law of appropriation, intended it should have some practical operation, which it could not if the issuance of a certificate for one piece of swamp land would confer upon the recipient the character of an appropriator of all the surface water on the swamp. To treat the certificate-holder as such appropriator, is in effect to clothe him with the right to say that the land shall always remain swamp and overflowed land; that the surface waters shall always be allowed to stand upon it, for the beneficial purpose of his assumed appropriation—the growing of tules. Not only that, but even before the issuance of any certificate, every migratory herdsman who run his stock or hogs in one of these swamps, could, on the same theory and with equal equities, claim to

be an appropriator of all the water. No Legislature, intending such results, would ever have deliberately framed a code of laws providing a complete and thorough system of rules and checks for the appropriation of the running waters on public lands. Nor would Congress, if the standing waters on the swamps could be so appropriated, or if to possession or purchase of swamp and overflowed lands as such, such far-reaching rights over the running waters on the public lands above were supposed to attach, have ever wasted the time to pass such statutes as the Desert Land Act above quoted.

On the contrary, from the beginning, the intention has been manifested that these waters shall *not* continue to stand on these swamps. The statute of 1850 granted them, because in a state of nature they were "unfit for cultivation," and granted them upon express condition that they should be made fit for cultivation, by being reclaimed—by draining off this standing water. It cannot be that a disregard of this condition can give rights *as an appropriator*, or that, by delaying its performance at will and indefinitely, the operation of other laws looking to appropriation of waters can be defeated or postponed. When the purchaser of swamp land claims that by virtue of his purchase he is an appropriator of the water on the land for beneficial uses, he asserts a claim directly repugnant to the very condition of his purchase—a pretension that the land shall continue to be swamp and overflowed, and shall not be so reclaimed as to be susceptible of artificial cultivation; that it is his right that it shall remain in a state of nature. He says, in effect, there is no reason why I should make any artificial appropriation or application of this water, because nature has made the application and appropriation for me, and I do not wish to make any change in it. But neither the United States nor the State ever intended thus to grant the swamp and overflowed lands. If they had, the grant would have been unconditional, as in the case of other lands. Even a patent by the State, expressing in terms a grant of such land to be held, during the will of the purchaser, in a state of nature, as tule pasture land, would be void on its face.

But, it is said, although under the law and the conditions of the grant, the land must be reclaimed, the natural pasturage destroyed, and arable, cultivable land substituted for it, still it was not contemplated that in so doing the purchaser

must, or that others may take away to a distance all the water, and so defeat the object of the grant by preventing the cultivation of the land when reclaimed. We make no such claim, and contend for no doctrine which leads to such a result. We simply say that even as to the water which circulates and is flowing in a water-course, he has no claim to its flow, *as a riparian proprietor*, freed from any obligation of putting it to use by first appropriating it; because we say that modern doctrine never was and is not applicable to the swamp any more than to other *public lands*; that the *natural flow* cannot be considered an appropriation, because that involves a breach of the conditions of the grant of swamp lands; that when the purchaser has complied with the law, and reclaimed his land, and rendered it susceptible of cultivation, it then ceases to be swamp land; and, like all other portions of the public land which cannot be cultivated without artificial irrigation, the owner must see to it that he *first* appropriates enough water for that purpose. The fact that the water naturally flowed over the land, gives no equity whatever to the owner of that land, unless he sees fit to avail himself of the common privilege of appropriation. Unless we are prepared to hold the strict riparian doctrine as to all public lands, there is no reason why we should apply it to swamp lands when reclaimed; because, when reclaimed, they then stand just as other public land which never needed any reclamation. If it is impolitic and unjust that the owner of a pre-emption tract, through which a water-course flows, shall condemn it to disuse because he will not or cannot himself appropriate it; for the same reasons the holder of swamp land should be held to the same measure of reasonable diligence and priority. If he intends in good faith to fulfil the conditions of his purchase, and no one else has appropriated the water, all he has to do is to go to work and give notice of his intention to appropriate and follow it up with reasonable diligence. If the water in question is not running water—is not water flowing in any watercourse—then, of course, it is not the subject of appropriation. The only way to appropriate that is to appropriate the land, for, as expressed in the New York Code, and other authorities, such water is part of the land. The owner of the land owns it and can do what he pleases with it; but that is only after it is on his land. The acquisition of the land gives him no rights whatever over the lands of others.

These considerations come, also in aid of the doctrine laid down in the late Iowa cases cited by us, and we find none to the contrary; (Vide *Haehl vs. City*, 57 Iowa 444. *Fulleam vs. City* 57, Iowa 457); and show that whether, as we contend, we construe the swamp land laws and patents in the light of existing conditions and existing laws of appropriation, or by the riparian law, no riparian rights can be held to pass.

It seems to be admitted that he who acquires title *after* an appropriation, takes the title subject to it. If we hold that, the whole law of appropriation fails the moment a right is acquired to the banks below, here they got no right to any *banks*, and if they had, curious results would follow an interpretation of the Code holding it only to mean that an appropriation might be made while all the banks remained public land. Suppose a *first* appropriation near the source—a certificate of purchase near the outlet before the first appropriation. As to all the fifty or one hundred miles intervening, there are no riparian rights. Is the first appropriation worthless altogether? And what would be the rights as between the owners of the intervening banks, and the certificate holder; and between them and the first appropriator above? And all the while the title is in the State, and the certificate holder has no equities binding on the State, and no rights whatever, except on condition precedent that he destroy the natural relations of the different parcels, *quoad* the water and the watercourse. Even if he could sue the State for specific performance, it would be a complete answer that he was trying to hold the swamp as a swamp, instead of reclaiming it.

The Court said in the Kimball case (45 Cal. 361) that the purchaser of swamp land acquires his title "and must be deemed to have acquired it with a full knowledge of the terms, conditions and purposes on and for which the grant to this State was made by the Federal Government. He must be held to have known, when he took the title, that the State, by accepting the grant, assumed an obligation to reclaim the land, and that it had already inaugurated a scheme for that purpose. He was bound in law to take notice of the public statutes above-mentioned, and must be deemed to have accepted the title in subordination to the paramount right and duty of the State to cause the land to be reclaimed. He cannot now, therefore, be permitted to set up his own wishes, nor his private interests, in opposition to the performance, by the

“State, of the obligation which it assumed to the Federal Government. On the contrary, as already stated, he must be presumed to have accepted the title in subordination to the right and duty of the State in that respect. It would practically defeat the whole scheme of reclamation contemplated by Congress, if *the mere sale of the land to private proprietors* should have the effect to exempt it from the power of the Legislature to reclaim it. Such a result would not only be *extremely disastrous to the State*, but in flagrant violation of its duty towards the Federal Government.”

So we say the purchaser took with notice, also, of all the Federal and State legislation and policy in regard to appropriation—subject to the then existing scheme of appropriation to beneficial uses—which scheme will also be practically defeated if the mere sale of the land should be held to revive or rather create the inconsistent doctrines of riparian law, as claimed by appellants. If the State had herself dug the Calloway canal, and through it diverted and applied the water exactly as we have done, even if the State could be sued like any individual, whatstanding in a Court of Equity would any mere certificate-holder, suing to enjoin the diversion as a riparian owner, or as an appropriator, by reason *solely* of having let his hogs wallow in the swamp, or his cattle eat the tules, have? And what difference does it make whether the State does the act or authorizes and licenses us to do it?

When the State inaugurated its Swamp Land policy, and provided for the sale of those lands, it reserved to itself, for all time, the right of control over them for reclamation purposes; the right to compel its certificate holders, or even patentees, to reclaim their lands, or else to itself reclaim them—as well those already sold as those remaining yet unsold. It could reclaim them when and how it saw fit; and as, in reclaiming them, it could take the water off and, if desired, utilize it elsewhere, so it could authorize others, its agents, to do the same. We, therefore, contend that, if our appropriation or diversion has in any manner, tended to take the water off from plaintiffs' lands, to reclaim them, or, as plaintiffs express it, “dry them up,” we are the agents of the State therein, authorized so to do and justified in so doing. It must be presumed that when the State inaugurates a grand scheme of public policy, or deliberately re-announces one already existing, it does so in view of all the then surrounding circumstance, of all its other schemes of public policy, and

with the pre-conceived purpose that so far as possible, all shall harmonize, work hand in hand, and lend what aid they can to one another towards carrying out the special plans of each. When, then, the State, by its Civil Code, dedicated, or rather, re-dedicated to its people the flowing waters on the public lands, invited all who would to come and take them, it contemplated that by so inducing a diversion of the waters from the streams for irrigation and other uses, it would not only benefit and improve the upper lands, but, in furtherance of this other, this Swamp Land policy, would greatly help prevent the waters wasting on the lower lands, the swamp and marshy lands, and so promote their speedy reclamation. And we, now, agents of the State, are doing that very thing—a lawful act—and plaintiffs cry against it.

The riparian law, as claimed by appellants, is wholly judge-made law. It was declared solely because it was supposed that the arguments, from convenience and policy, dictated it. If they did where and when it originated, they evidently do not with us. By that law, as Wood expresses it, "the uses of water may properly be divided into two classes, primary and secondary. The *primary* right is to its use for domestic purposes for the support of life in man and beast, and the *secondary* right is its use for manufacturing and other beneficial purposes. Therefore, if there is not more than sufficient water in a stream to supply the *primary* wants, no one can use the water for any of the *secondary* purposes." Citing *Evans vs. Merriwether*, which sustains our position that with us irrigation is a *primary* purpose. Further, it may be taken as settled, even under that law, that for *primary*, or, as they are sometimes called, ordinary or natural purposes, the party having access may use all the water essential, even though he take the whole. On this, Wood, Washburn, and Angell, seem to agree.

"So far as natural wants are concerned, * * each, * * in his turn may, if necessary, consume *all* the water. * * In countries differently situated from ours, (Illinois), with a hot and arid climate, water, doubtless, is *indispensable* to the cultivation of the soil, and, in them, water for *irrigation would be a natural want.*"

Evans vs. Merriwether, 4 Ill. 492.

Angell, § 128.

Accordingly, this Court has said that in California the use for irrigation is *absolutely essential*. (56 Cal. 580.) On any theory of the case, then, the Government, by the Desert Land Act and otherwise, could, and did authorize us to use it *all* for irrigation, that being here, not only a natural, primary, or ordinary use, but the *paramount* use. The maxim *de minimis* may well be invoked as to the uses, called *primary* by Wood. And if there are any interests worthy of consideration, in framing a great system of law and policy here, dependent upon drinking out of or washing in California water-courses, to what extent will the doctrine we invoke injure them? How few will be the instances where the very rule of prior use will not be their best protection?

On the other hand, we know your Honors will not be insensible to the inevitable results of now unsettling all the rights which have grown up, by adopting any other rule than the simple California rule of prior appropriation. Can the extent and perplexing intricacy of the interminable litigation which must arise be exaggerated? Amicable settlement impossible, from the very nature of the subject matter; the very artificial and intricate character of the modern riparian doctrine; the number of persons who may successively—those of age within five years, those under disabilities indefinitely—set up claims as riparian owners; the changing volume of the water from flood time to drouth; the minute subdivisions of interests among appropriators; the various decisions of questions of fact, continually recurring between the same and between different parties of record.

It was suggested that similar objections lie to the rule of appropriation; but we submit that on close reflection they all amount to nothing in practice, as has been demonstrated by the working of the system heretofore; and as must be more fully demonstrated under the Code. For instance, it was suggested that the question of diligence, one of fact, may arise. That never was formidable, and the Code reduces it to a *minimum*, by defining what shall constitute negligence.

It has also been suggested that the doctrine of appropriation tends to a monopoly. We all know that this English doctrine of riparian rights does itself preeminently tend to a monopoly, to a tying or locking up of a thing which is most valuable in California; which is now, more than ever, essential to the growth, pros-

perity and civilization of California; upon the use of which, at points remote from the water-courses, depend to-day the very existence and life of great and growing communities. But, it is said on the other hand, if you apply this early California doctrine and early English doctrine of prior appropriation to beneficial uses, that, also, leads to this same monopoly; that, also, has its faults; because by that doctrine the man who happens first to go up to where the stream comes from the Sierra Nevadas, from the mountains, and posts his notice, written on a piece of paper, that he claims all the water of that stream, may lock it up, and he, too, will become a monopolist. But when you come to look at it—to consider the two systems—the advantages and the inconveniences bear no comparison, the one with the other. In the one case, coupled with this law of prior appropriation, springing out of the same berth, by this doctrine of appropriation the water appropriated cannot be held for speculative purposes, and cannot be held any longer than it is applied to uses and beneficial; it does not give an absolute and unqualified title to any monopoly, but simply a usufruct, a right to keep it as long as you apply it, as far as it can be applied and to its full capacity, to some useful and beneficial purpose. There is the one great distinguishing difference between the two cases—between appropriation and riparian ownership below. A distinction grounded upon the mere limited use and right of use, bounded and limited by the actual application of the water to a beneficial purpose, which can lead to no waste or misuse of the element. No matter if I had gone in early days to the head of Kern River at the Rio Bravo and taken the whole of it, complying with the law I could hold not one single drop of that, against anybody who wanted to utilize it below, except on showing that I was putting it to its appropriate use, utilizing it to the best advantage, or at least a beneficial purpose.

Now, so far as the State is concerned, so far as the great interests of the State go, so far as the wise policy of the law is concerned, it matters not whether I have gone there and done that above, if it fertilizes an arid waste, or whether somebody else uses that same water on the same number of acres below. In either case the grand desideratum, the grand result is obtained—that that thing which is so scarce and so valuable is applied to a beneficial use, and is not held for speculative purposes, or to levy tribute, but is put to its ap-

propriate use and brings forth all the fruits it is capable of maturing.

But it is said I may not only use it but I may sell it. Because we all know from the very earliest history of California, in mining as well as in agriculture, it is impossible for those whom the great beneficial scope of this doctrine will reach, if applied—small holders and builders of happy homes on these Government lands—it is impossible for them with their limited means, straining their whole souls to gain a homestead and to cultivate it, it is impossible for them to carry out a work of the magnitude required in these operations. What harm, then, if some man who has the capital—if he himself does not put it on his own quarter section, does not irrigate his own little vineyard, or his own orchard, or his own field or garden—applies his capital for the purpose of bringing it within the reach of others, and is selling it to others for a useful and beneficial purpose? If it is being used and applied, what difference does it make in the application of the principle, and the beneficence of the principle, and the balancing of conveniences between the two systems, whether it is taken up by somebody who sells it to those who put it to a useful purpose, or whether the man who takes out a little bit of a stream himself applies it, by his own hand, to that purpose?

By the organic law of this State it is provided, as by the statute of this State passed in pursuance of that organic law, that the man who so appropriates cannot play the monopolist, cannot waste or misuse those privileges; but that the very people of the community who are to be benefited have the absolute power always to say just what he shall charge for the water which he sells.

Now, there you have in the organic law of the State, and in the custom of the State which grew up with the State, as a part of the life of the State, as filling the wants of the people of the State, you have this beautiful principle of prior appropriation. The more you think of it, the less you can conceive of any practical objection to it; or where any harm can be done to any one; where any rights of anyone can be assailed; where any injustice can accrue to any one. To all is thrown open this grand heritage. With the genius—because it amounts to genius—the provision of those who inaugurated the system, of this grand heritage is put to its appropriate uses, without injustice to any and for the greatest good of all. No speculation, no tying up and

holding in dead hands forever of that which is the life-blood of the State and the people. A public use, administered under the supervision of the people, under the control of the people who at all times can see that it is properly administered. At no time can there be misuse; at no time wrong or injustice done.

Now turn to this other doctrine. Seek to roll back the wheels of time, undo all that has been done by legislation and built up by laws the outgrowth of our needs. Apply this riparian doctrine to this very stream of Kern River. Not only does the owner of land at the bottom of this stream at Tulare Lake, because he has gone and paid twenty per cent. of the little pittance that the State exacts for the certificate of purchase of this swamp land, not only does that one man become the master of the whole country and the life of all the communities above, but even if you can settle with that one man and control him—you cannot interfere with his vested rights—even if you could agree with that one man, that does not help you one single step in the matter; because all along the course of the stream according to their doctrine—and that illustrates the absurdity of applying the doctrine to such a diverse state of affairs—all along the course of the stream every single owner can block the way, every single owner can play dog in the manger; every one can say he will block the wheels of progress of this whole people. Now think of it for one moment; here; now; when for the first time in California, they are beginning to utilize these vast tracts, think of the application of this principle, the operation of this principle, when it is going to substitute for barren fields and a few cattle ranging over the hills, with no population and no civilization, fruitful fields and vineyards, numerous and populous communities, farms and homesteads, all this prosperity, this life and this beauty. How can any Californian for one moment hesitate as between the two, when, to adopt the one he simply stands upon her ancient ways and carries into effect the law which was always the law of California, from the time the State of California existed; when to adopt the other he simply gives to some favored few the right to levy tribute—to barter their mere non-action; but, to the people, gives ruin.

Another conclusive reason for affirming the judgment in this particular case, grows out of the fact that Buena Vista Lake is really the terminus of the water-course.

Until prevented by artificial obstructions made after

In *Regina vs. Metropolitan*, 3 B. & S. 710, the prosecutor's estate was partly upon a gravel bed, itself in a basin of clay, and containing from time immemorial a pond fed by powerful springs. The water overflowed one edge of the clay basin, and formed a rivulet which had been for many years in actual use, and was very valuable as well as ornamental. The diversion consisted of cutting through the gravel bed and basin of clay, the direct and immediate result being to prevent the springs from finding their way into and feeding the pond, thus drying up the rivulet. Cockburn, C. J., asked if the damage was not too *remote*, and it was so held by the Court.

ordinary flow to which a riparian proprietor below is entitled; and, by the common law authorities we have cited, the water in the lake, after it has reached the lake and is there standing on the land in a state of *inertia*—not being flowing water; without current; not having reached and become part of a definite water-course—may be diverted. For the same reasons, if not *a fortiori*, it may be diverted before it even gets into the lake itself. It matters not, as the authorities expressly say, that if left alone it might overflow and commence running and get into even a definite water-course below. While it is standing it is the absolute property of the owner of the bed of the lake, and those below have no rights in it; and no right to claim that the owner of the bed shall keep it covered with water—a nuisance to himself and the whole neighborhood. It might as well be claimed that when there is a heavy fall of snow, it can't be shoveled off, because with the coming summer, it would melt and run down; or that ice cannot be cut and taken away by any one against the protest of an *infra* riparian proprietor.

In *The State vs. Pottermeyer*, 33 Indiana, 402, is an able discussion of questions identical in principle. After stating that in a former case it had been decided that there can be no property in ice formed upon an artificial pond on one's own estate, the Court say:

“Indeed, that water is included in the term land, is taught by the text-writers. ‘Land, *Terra*, in the legal signification, comprehendeth any ground, soil or

"earth, whatsoever. * * So it was held in Greyes' Case, Owen, 20, that fish in a pond passed, not to the executor, but to the heir.' * * But while it must be admitted that water in a pool upon a man's own estate is his property and part of his real estate, it is denied that he has any property in the water of a stream which passes over his soil, but a simple *usu-fruct* while it passes along. * * But the entire ground upon which any property in water, as water, flowing in a stream is denied, in distinction from the admitted property in its *impetus*, is that, as Blackstone states, 'it is a movable, wandering thing, and must of necessity continue common by the law of nature.' In *Sury vs. Pigot*, Popham, 166, it is quaintly said, that an *ejectione firma*, will not lie for water 'because it is not *firma*, sed *currit*.' But when this, movable, wandering thing, has congealed and become attached to the soil, does it not, like any other accession thereto, become part of the realty? Wherein does it differ from alluvion or accretion? which is but the imperceptible deposit or addition of earth, sand, gravel and other matter made by rivers, floods or other causes, upon land. It is the adhering of property to something else, by which the owner of one thing becomes possessed of a right to another. * * It has been held 'the sea-weed thus thrown up by the sea may be considered as one of those marine increases arising by slow degrees.' * * In *Blewett vs. Tregonning*, 3 A. & E., 554, which was an action for trespass for taking away sand from the plaintiff's close, it was pleaded that the close was contiguous to the sea shore; that the sand had from time to time drifted, and been carried by the wind * * upon the close. * * Patterson J., said: 'I am, however, of opinion that when anything in the nature of soil is blown or lodged upon a man's close, it is part of the close, and he has a right to it against all the world.' If water in a pool upon one's land be part of the realty, because fixed and stationary, why is it not, when congealed over the bed of the stream, to the thread of which his title extends? True, nature will in time, if it be not removed, again change the ice to fluid, and it will pass away from possession; but not more certainly than the changing winds and the rising tide will sweep away the shifting sands. * * It follows that the instructions given were erroneous. One of those instructions was that it made no difference if the ice was in the backwater of a mill-dam, where the current was checked, etc.

Until prevented by artificial obstructions made after our appropriation, at least one half of the water of Kern River flowed down Old River direct into Kern and Buena Vista Lakes. All the other half of the ordinary and usual flow went into Buena Vista Lake through New River. The result was the gradual filling up with water, each wet season, of the lake composed of the blending of Kern and Buena Vista Lakes into one large sheet, and the constant building up of the lowest point on the margin, by the deposit formed at the mouth of New River. Until this large lake is filled to overflowing, an immense tract of land is made to serve as a basin or receptacle in which the water stands in a state of inertia, and without current, just as water does in a tank which is being filled by two pipes. If all the water from both conduits is allowed to flow in, in those years when the supply exceeds the evaporation and percolation, some will escape over the margin. Now this escape is not the usual and ordinary flow to which a riparian proprietor below is entitled; and, by the common law authorities we have cited, the water in the lake, after it has reached the lake and is there standing on the land in a state of *inertia*—not being flowing water; without current; not having reached and become part of a definite water-course—may be diverted. For the same reasons, if not *a fortiori*, it may be diverted before it even gets into the lake itself. It matters not, as the authorities expressly say, that if left alone it might overflow and commence running and get into even a definite water-course below. While it is standing it is the absolute property of the owner of the bed of the lake, and those below have no rights in it; and no right to claim that the owner of the bed shall keep it covered with water—a nuisance to himself and the whole neighborhood. It might as well be claimed that when there is a heavy fall of snow, it can't be shoveled off, because with the coming summer, it would melt and run down; or that ice cannot be cut and taken away by any one against the protest of an *infra* riparian proprietor.

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“... it is a man’s own real estate, it is the water of a simple *usu-* But the entire water, as water, action from the that, as Black- ing thing, and by the law of m, 166, it is will not lie for *rit.*’ But when congealed and t not, like any of the realty?

“Wherein does it differ from accretion? “which is but the imperceptible deposit or addition of “earth, sand, gravel and other matter made by rivers, “floods or other causes, upon land. It is the adhering “of property to something else, by which the owner of “one thing becomes possessed of a right to another. “* * It has been held ‘the sea-weed thus thrown “up by the sea may be considered as one of those “marine increases arising by slow degrees.’ * * In “*Blewett vs. Tregonning*, 3 A. & E., 554, which was an “action for trespass for taking away sand from the “plaintiff’s close, it was pleaded that the close was “contiguous to the sea shore; that the sand had from “time to time drifted, and been carried by the wind “* * upon the close. * * Patterson J., said: ‘I “am, however, of opinion that when anything in the “nature of soil is blown or lodged upon a man’s close, “it is part of the close, and he has a right to it against “all the world.’ *If water in a pool upon one’s land be “part of the realty, because fixed and stationary, why is it “not, when congealed over the bed of the stream, to “the thread of which his title extends? True, nature “will in time, if it be not removed, again change the “ice to fluid, and it will pass away from possession; “but not more certainly than the changing winds and “the rising tide will sweep away the shifting sands. “* * It follows that the instructions given were er- “roneous.” One of those instructions was that it made no difference if the ice was in the backwater of a mill-dam, where the current was checked, etc.*

The fact that water is of such prime importance and value in California, when *appropriated*, and by appliance and labor artificially bestowed, devoted to beneficial uses, and of so little worth in its natural flow and condition, furnishes an additional and cogent argument in favor of upholding the doctrine of *laches* in cases like this, we have elsewhere collected fully, and quoted from, the authorities to show how well established this doctrine is and ever has been. In view of the exercise of the discretion of the Court below, and its findings of laches and acquiescence, and of the evidence supporting the findings, and the long continued custom on the stream and in this part of the county, and of the many other appropriations pleaded, and their magnitude, and the necessary consequences, not only to the Calloway but to other appropriations, and, to say the least of it, the doubtful and novel character of the right asserted by plaintiffs, we may safely say that *no authority in point*, for the denial of the plea of laches here, has been or can be adduced.

In the most recent of them, the doctrine of laches is not denied, but decrees simply *affirmed*, denying its applicability to the cases, wanted in some of the elements here present. While affirming such denials we find them saying that "the Chancellor *may* refuse " to act when greater injury would result from an injunction, than by leaving the party to his redress before a Court and jury—that he will act only when he " can do so *without hesitancy*."

In the latest case we have seen, the failure to object, with full knowledge, followed by large expenditure, is held sufficient.

Prybylowicz vs. Missouri, 17 Fed. Rep. 492.

The most that can fairly be made of the cases cited against us, is that *mere* lapse of time, short of the Statute of Limitations, (*where there is a Statute of Limitation applicable*), will not constitute a defense. But we do not think there can be said to be well considered authority for the position, that delay to sue for a period just short of the statutory bar, with full knowledge, and without protest or objection, if the other party has altered his condition, or when large expenditures have been made, or especially if third persons have acquired rights, or will be injured or suffer, will not uphold a finding of laches and justify the withholding of *equitable* relief. But here, in addition, there is ample, we think overwhelming, evidence that de-

fendants acted *bona fide*, in the warrantable belief that they had a right to divert the water—in fact the finding thereon is not disputed; that, in the view of a Court of Equity, it was incumbent on the plaintiffs, before allowing such vast expenditures to be made, to make known their objections, and in some way assert their claims; that fair-dealing and neighborly obligation called upon them so to act; and that the only inference consistent with honesty and rectitude of intention on their part, is that they consented to what they did not, under these circumstances, forbid; that it amounts to constructive fraud so to stand by, and after seeing such works constructed, afterwards seek to destroy them. Certainly so, when, at least on one occasion, they actively took part, by requesting more water to be turned into this canal *for the reason* that it was an injury to them in its unobstructed flow.

We submit that there is nothing in the distinction attempted to be drawn between different kinds of equitable relief, or equitable jurisdiction, or interference; between the answer it gives its suitors when they sue in aid of a legal right, and when they seek to enforce an equity, without or against the legal title; between specific performance, for example, and injunction. In all cases the foundation of jurisdiction is the want of remedy at law; in all, the limit and qualification; that he who seeks must do equity; that nothing can call forth a *Court of Equity* into activity but conscience, good faith, and personal diligence; that equity aids the vigilant only. The reason of those rules, and, therefore, the rules themselves, apply to all suits in equity. The only distinction is between actions at law and suits in equity, not between one kind of suit and another kind of suit.

And so with regard to estoppel, a similar distinction must be observed: That between an equitable estoppel and a legal estoppel by matter *in pais*, “the latter being enforced from considerations of public policy, though, in some instances, subversive of the equity of the particular case. Hence, such estoppels have been said to be odious, and to demand a strict construction. But an equitable estoppel is not odious, and is intended to promote and effectuate equity. It will be found that great confusion has resulted from oversight of the plain distinction existing between a legal estoppel founded upon, and administered according to strict and technical rules, regardless of the equity of the particular case, and an equitable estoppel,

“ adopted for the very purpose of preventing a party,
 “ contrary to the equity of the particular case, *from*
 “ *setting up technical rules in subversion of that equity.*
 “ (See *Drew vs. Kimball*, 43 N. H., 282, and *Horn vs.*
 “ *Cale*, 51 N. H., 287.) We are considering now a
 “ pure equitable estoppel, the principles of which are
 “ oftener applicable to estoppels by *conduct*, as in this
 “ case, than to estoppels by reason of express dec-
 “ laration.” (*Stevens vs. Dennett*, 51 N. H., 333).
 In which case the party held estopped to claim the
 water had witnessed a deed to another. We also cite
 the exhaustive opinion in this case as showing that *if*
from the conduct of the plaintiffs, the defendants might rea-
sonably have inferred that acquiescence in the diversion, or
if the plaintiffs negligently or culpably stood by and al-
lowed the diversion to be made on the faith and understand-
ing that the diversion was lawful and no infringement of
their claims, that is a sufficient equitable defense.

Of course, it was for the court below to draw the
 proper inferences of fact from all the circumstances.
 But was it possible to draw any other than that the
 Calloway was projected and completed in the *bona fide*
 and reasonable belief that the diversion infringed no
 claims of the plaintiffs, in the face of the customary
 law and usage on the public lands in California, and
 the universal custom and habit on this very river?
 Would any one imagine that if any riparian rights ex-
 isted on Buena Vista Swamp, nothing would have been
 heard of them till this suit was brought? That the
 claimants would be silent, or when they did speak, ac-
 tively acquiescent during all those years while all
 great canals were being builded and used? Either the
 plaintiff's claimed no riparian rights; never intended to
 assert any; desired the water to be diverted; acqui-
 esced in the diversion and assented to it; or they stood
 by with full knowledge, intending to allow all this
 money to be invested, and then, at the last moment, to
 demand their own terms. They say they only got their
 patents or some of them a short time before they
 brought suit. But why wait till they got the patents?
 Either they had rights, which were being invaded to
 their knowledge before the issuance of the pat-
 ents, or rather before the first step in the Calloway ap-
 propriation, or they had none. If the latter, they have
 no cause of action either at law or in equity. If
 the former, they are guilty of laches. This is no ques-
 tion of whether the Statute of Limitations would com-
 mence running before the issuance of the patents.

In support of the foregoing propositions we cite :

In *Parker vs. Foote*, 19 Wend., 318, Judge Bronson says :

"It cannot be necessary to cite cases to prove that those portions of the common law of England which are hostile to the spirit of our institutions, or *which are not adapted to the existing state of things in this country, form no part of our law.*"

Before the adoption of the common law, the Mexican law prevailed, a law always subject to modification by custom and usage, more so even, if possible, than the common law.

Donner vs. Palmer, 31 Cal., 521.

Escriche Derecho Español, 23-24.

Escriche Dic. Tit. Costumbre, 1 Feb. Mej., 55 to 61.

Castro vs. Castro, 6 Cal., 160.

Reynolds vs. West, 1 Cal., 326.

Strother vs. Lucas, 12 Peters, 410.

Tevis vs. Pitcher, 10 Cal., 477.

Posten vs. Rasette, 5 Cal., 467-9.

Renner vs. The Bank of Col., 9 Wheat., 585.

The common law also was the customary law, the bulk of it judge-made law. "Therefore, in that law," as Lord Coke says, "the argument from inconvenience very much availed. The benefits of the elements—the light, the air and the water—can only be appropriated by the occupants. If I have a vacant window overlooking my neighbor's, he may not erect any blind to obstruct the light; but if I build my house close to his wall, which darkens it, I can not compel him to demolish his wall, for there the first occupancy is rather in him than in me. * * * If a stream is unoccupied, I may erect a mill thereon and retain the water; but yet not so as to injure my neighbor's prior mill or his meadow, for he hath, by the first occupancy, acquired a property in the current."

2 *Blackstone*, 403.

"I think no doctrine better settled than that such portions of the law of England as are not adapted to our condition form no part of the law of this State. This exception includes not only such laws as are inconsis-

“ent with the spirit of our institutions, but such as were
 “framed with special reference to the physical condition
 “of a country differing widely from our own. It is con-
 “trary to the spirit of the common law itself to apply a
 “rule founded on a particular reason to a case where
 “that reason utterly fails. *Cessante ratione legis cessat*
 “*ipsa lex.*”

20 Wend., 159.

“Rules of law should be adapted not only to the
 “moral but to the physical condition of the country.
 “Had the common law originated on this continent,
 “we should never have heard of the doctrine that fresh
 “water rivers are not navigable above the flow of the
 “tide; nor would our courts of justice have been called
 “upon to compromit the interests of the community
 “by sacrificing truth to technicality, and substance to
 “form.”

5 Wend., 463.

This principle has always applied, not only in regard
 to the question of riparian rights, but in all cases where
 it has been contended that the doctrines of the common
 law unsuited to our condition have been adopted by
 the adoption of the common law as the basis of our juris-
 prudence.

Thus the settled doctrine of the common law always
 was, and is, that there is a right as appurtenant to a
 house, as light and air, that if a man grants a house in
 which there are windows, they cannot be deprived of
 light by building on the adjoining ground not sold.

Allen vs. Taylor, 16 Ch. Div. 357.

So the common law recognized an easement in favor of
 one tenement and servitude upon and over the other to
 enjoy the light and air which naturally reaches the former
 in coming laterally from and across the land of the adja-
 cent proprietor.

Wash. Easements, 604 (490), (3d Ed.)

By the common law “one may prescribe for the right
 “of light and air to come to his windows unobstructed
 “across the land of another, if enjoyed for twenty
 “years, or the period of ordinary prescription.”

Id. P. 608 (493).

But "the reason for adopting a different rule in this country, as to prescriptive rights to light and air, from that which prevails in England is, that the latter is not suited to the condition of a country which is growing and changing so rapidly in all its relations of property, as well as its value and modes of enjoyment. And in this is witnessed another illustration of the influence of those silent agencies which are constantly at work in a free community, in adopting and giving form and consistency to the rules of its common law, to meet the wants and condition of the body politic."

Ib., P. 612 (498).

In Massachusetts, the doctrine of the common law that the right existed both by prescription and without prescription, if the owner of both house and land sold the house, was upheld, (*vide* 12 Mass., 157), but later, in *Keats vs. Hugo*, 115 Mass., 210, the American doctrine was substituted, and the common law said not to be adapted to the existing state of things in the United States, and not to be applied in our growing cities and towns without working the most mischievous consequences.

We have made the foregoing quotations, which assume, like the water cases, that the said doctrine as to air and light are those of the *common law*—not merely the modern interpretation of it; but the analogy holds here also, for "it would be difficult to prove that the rule in question was known to the common law previous to the 19th of April, 1775. * * The doctrine was not sanctioned * * until 1786 * * (2 Saunders, 175). This was clearly a departure from the old law. (*Bury vs. Pope*, Cro. Eliz., 118.)" Bronson, J., 19 Wendell, 318.

The case of *Darwin vs. Upton*, 2 Saunders, 175, is an innovation, like *Mason vs. Hill*.

So, the common law rule in regard to fencing in one's own cattle was *never in force* in California, being repugnant to our customs and to our statutes.

Waters vs. Moss, 12 Cal., 538.

Speaking of the common law rule, that the owner must fence in his own cattle, Judge Trumbull says:

"However well adapted the common law may be to a densely populated country like England, it is surely but ill adapted to a new country like ours. If this

" common law rule prevails now it must have prevailed
 " from the time of the earliest settlements in the State,
 " and can it be supposed that, when the early settlers of
 " this country located upon the borders of our exten-
 " sive prairies, they brought with them, and adopted
 " as applicable to their condition, a rule of law requiring
 " each one to fence up his cattle; that they designed the
 " millions of fertile acres stretched out before them to go
 " ungrazed, except as each purchased from the Govern-
 " ment and was able to enclose his part with a fence?
 " This State is unlike any of the Eastern States in their
 " early settlement, because from the scarcity of timber, it
 " must be many years yet before our extensive prairies
 " can be fenced, and their luxuriant growth, sufficient for
 " thousands of cattle, must be suffered to rot and decay
 " where it grows unless the settlers upon their borders
 " are permitted to turn their cattle upon them. Perhaps
 " there is no principle of the common law so inapplicable to
 " the condition of our country and people as the one which
 " is sought to be enforced now for the first time; * * *
 " and we should feel inclined to hold, independent of any
 " statutes upon the subject, on account of the inapplica-
 " bility of the common law rule to the condition and
 " circumstances of our people, that it does not and never
 " has prevailed in Illinois."

Seeley vs. Peters, 10 Ill., 140.

So, in *Vicksburg vs. Patton*, 31 Miss., 185, the same
 view is taken, and the common law held not to prevail,
 because inapplicable to the condition of things in Missis-
 sippi as differing from that in England and some of the
 older States, the Court saying: "In a densely populated
 " country like England, with small farms and but few
 " cattle, the reason of the rule, that every man shall
 " prevent his cattle from going at large, is apparent, and
 " the rule prevails because it is suited to the conditions
 " of that country. The same reason may render it appli-
 " cable in many States of this Union."

In *Cribbins vs. Markwood*, 13 Gratt., 502, the Court
 refused to apply the English rule that purchasers from
 reversioners have the burden of proving the adequacy
 of the consideration, remarking that the rule, if distinctly
 settled in England, was not settled at the date of Ameri-
 can independence, and (p. 505) that the reasons of policy
 which influenced the English Courts, have but little
 application to this country.

S. P. — *Kerwhacker vs. C. C. etc.*, 3 Ohio St., 182:
 “The doctrine of the common law may be suitable to an
 “old and highly cultivated country, where all the lands,
 “except the public highways and commons, are under
 “inclosure, but it has no suitable and proper application
 “in Ohio.”

See *People vs. Canal, etc.*, 33 N. Y., 468, for an elaborate presentation of the reasons why the doctrine *ad medium filum* does not apply to large rivers, lakes, etc., in this country, because the common law is inapplicable, etc.

Speaking of riparian rights in rivers navigable in fact but above ebb and flow of tide, and deciding there are none, Yeates, C. J., says the statute provides that the common law of England shall be in force and binding. “But the uniform idea has ever been, that
 “only such parts of the common law as were applicable to our local situation have been received in this
 “government. The principle is self-evident. The adoption of a different rule would, in the language of Sir
 “Dudley Rider, resemble the unskillful physician who
 “prescribes the same remedy to every species of disease.”

Carson vs. Blazer, 2 Binney, 483

Flanigan vs. City, 42 Penn. St., 229.

Angell, Sec. 549.

“All the King’s subjects have a right to the use of
 “flowing water, provided that in using it they do no injury to the rights already vested in another *by the appropriation of the water.*”

Williams vs. Moreland, 2 B & C., 910; decided A. D., 1824.

“Water flowing in a stream, it is well settled by the
 “law of England, is *publici juris.*”

Liggins vs. Inge, 7 Bingham, 691; decided A. D., 1831.

Angell says, (Sec. 130), that the doctrine of *Cary vs. Daniels* (Shaw, C. J.) seems in accordance with that of *Tindal, C. J.*; and Sec. 133, that *Mason vs. Hill* settled the law in England. That case was finally decided A. D., 1833. 5 Barn. & Adolp., 1.

A similar case to *Cary vs. Daniels* is *Tye vs. Catching*, 78 Ky., 463-466, holding that the right to the use of a stream can be acquired by occupancy; the right of the second occupant of the stream, for the same purposes, is subordinate to the right of the first, citing Angell Sec. 130.

"If water has been accustomed to flow along a channel from time immemorial, and it has been unappropriated, the first owner of adjoining lands on both sides of it, who appropriates it without doing any injury to any one either above or below him, acquires such a right by his appropriation, that though he may not have enjoyed his appropriation for twenty years, he may maintain an action against any owner of lands above him who wrongfully diverts, etc."

Frankum vs. Falmouth, 6 C. & P., 530.

"If a man find water running through his land, he may appropriate it, and thus acquire a title to the water. *Bealey vs. Shaw*, 6 East., 208."

Canham vs. Fisk, 2 C. & J., 126; decided A. D. 1831.

In *Stockport W. W. Co. vs. Potter*, 3 Hurlst & Coltman, 323, it is said that *Embrey vs. Owen*, 6 Exchequer, 353, decided in 1851, and other modern cases, for the first time defined and attributed to the ownership of land, by the side of the running river, these rights in respect to water, these riparian rights.

At common law, the right to use of water is a right of occupancy.

Comyn's Digest, Vol. 7, p. 292.

Take the law of corporations: In England, at common law, they could only contract under seal; and, though the rule has been relaxed in England as to statutory corporations, it still firmly exists as a general rule. But in the United States it is entirely abrogated, and that by judicial decisions.

2 Kent's Commentaries, 288 and following.

So, in England, corporations cannot accept bills unless the power is expressly given or necessarily implied. In America the law is otherwise, and the power asserted without qualification.

Ibid, 290; (Note 12th Ed.)

By the common law, a judgment in an action against one of several tort-feasors is a bar to an action against the others for the same cause, although such judgment remains unsatisfied. In *Brinsmead vs. Harrison*, S. R. 7 C. P. 547, the Court say it was so held in the time of James First; that one hundred and fifty years afterward, it is quoted in a book of the highest authority, viz: *Comyn's Digest*, which alone would be sufficient.

Did we adopt that by adopting the common law? No lawyer would venture the suggestion. For a similar illustration see *In re Phene Trusts*, L. R., 4 Eq. Cases, 416, as compared with *Montgomery vs. Beavans*, 1 Sawyer, 666.

In regard to fixtures, at common law the relaxation in favor of the tenant did not extend to erections solely for agricultural purposes; but down to the date of *Eleves vs. Maw*, 3 East's, R. 38, decided in 1802, this common law doctrine, like the riparian doctrine, down to the date of *Mason vs. Hill*, was still disputed by some Judges.

Van Ness vs. Packard, 2 Peters. 144.

There the Court say:

"The common law of England is not to be taken in all respects to be that of America. Our ancestors brought with them its general principles, and claimed it as their birthright; but they brought with them and adopted only that portion which was applicable to their situation. * * * * Between landlord and tenant it is not so clear that the rigid rule of the common law—at least as it is expounded in 3 *East*, 38—was so applicable to their situation as to give rise to necessary presumption in its favor. The country was a wilderness, and the universal policy was to procure its cultivation and improvement."

Van Ness vs. Packard, 2 Peters, 144.

As to copyright, "no one will contend that the common law, as it existed in England, has ever been in force, in all its provisions, in any State in this Union. It was adopted so far only as its principles were suited to the condition of the colonies; and from this circumstance we see what is common law in one State is not so considered in another. The question respecting the literary property of authors was not made a subject of judicial investigation in England, until 1760; and no decision was given until * * * * 1769. Long

“before this time the colony of Pennsylvania was settled.
 “What part of the common law did Penn and his associates bring with them from England? * * * *
 “Can it be contended that this common law right, so involved in doubt as to divide the most learned jurists of England, at a period * * * as much distinguished by learning and talents as any other, was brought into the wilds of Pennsylvania by its first adventurers? Was it suited to their condition?”

Wheaton & Donaldson vs. Peters, 8 Peters, 660.

“It was the common law we adopted, and not the English decisions.”

Marks vs. Morris, 4 H. & M. Va., 463.

In regard to the common law doctrine, that a parol conveyance of land with delivery is good.

“The policy of law and the custom of our country, the danger of perjury, and the many inconveniences * * * would, in the absence of all legislative provision forbid the adoption of the rule.”

Lessee vs. Coats, 1 Ohio, 245.

In regard to attornment, “it was founded upon a state of society which certainly never had any existence in Michigan. The peculiar reasons and relations out of which this doctrine sprang, never having had any existence here, why should the rule itself? When the reasons from whence the rule arose cease to exist, the rule should cease also. In a country where they never existed, a rule should not be adopted. * * * The doctrine of attornment is inconsistent with our laws, customs and institutions.”

Barron vs. L., 34 Mich., 295.

“The opening of the war of the Revolution is the point of time at which the continuous stream of common law became divided, and that portion which had been adopted in America flowed on by itself, no longer subject to changes from across the ocean, but liable still to be gradually modified through changes in the modes of thought and of business among the people, as well as through statutory enactments.”

Cooley Const. Limitations, 25, 33.

"In the mining States and Territories a peculiar species of common law, relating to mining rights and titles, has sprung up."

Ibid in Note 1.

In *Hatch vs Dwight*, A. D. 1821, 17 Mass., 289, "the Court states the law to be: the owner of a mill-site, who first occupies it by erecting a dam and mill, will have the right to water sufficient to work his wheels, if his privilege will afford it, notwithstanding he may by his occupation render useless the privilege of any one above or below him upon the same stream." * * *

"This broad doctrine of the effect of the mere priority of occupation has been somewhat criticised by other Courts." * * *

"The subject was deliberately examined by the Court in *Thurber vs. Martin*, 2 Gray, 394, wherein it was held priority of occupation secures to the first occupant the exclusive right to the use of the water to the extent of the occupation."

Washburne, E. & S., 252 and following.

In the Colonies existing before the Revolution the common law adopted, whether by statute or without, meant the common law at the time of their emigration, excluding English statutes passed thereafter, because they had legislatures themselves. As to new States, when they adopt the common law it must be intended the common law, as it existed at the time of the Revolution. Neither English statutes nor English decisions, after the Revolution, form any part of it. And under such a statutory adoption as that of California, the portions of the common law, as it existed prior to the Revolution, inapplicable to our condition, etc., are not adopted any more than they were imported by the original Colonies.

Coburn vs. Harvey, 18 Wis., 162.

Spaulding vs. Chicago, 30 Wis., 1-110.

Morgan vs. King, 30 Barb., 12.

The same case in 35 N. Y., 458-9.

As to the inapplicability of the common law, and as to the policy of appropriation as applied to the diversion and appropriation of water after patent to outlet, a strong analogy is found in the decisions subordinating the actual possession for grazing or agriculture to a subsequent mining location, even when the former located before any legislation on the subject.

In *McClintock vs. Bryden et al.*, 5 Cal., 100, it is held that the Statute adopting the rules and customs of miners implies a permission on the part of the miner to enter upon prior possessions held for farming, and that such legislation is retroactive.

"The wants and interests of a country have always had their due weight upon Courts in applying principles of law which should shape its conditions; and rules must be relaxed, the enforcement of which would be entirely unsuited to the interests of the people they are to govern."

In the new agricultural States it was the policy to encourage possessions for farming; here it was not. So as to riparian rights. Otherwise "persons without any right but that of possession could, under the pretense of agriculture, invade the mineral districts of the State, and swallow up the entire mineral wealth by settlements upon one hundred and sixty acre tracts of land. It would be using the law to a very bad purpose if we should allow a person who has no evidence of title but his improvements, and no right but that of the naked possession he has usurped, to destroy for his own benefit the business of a neighborhood, and put as well the Government as the mining public at defiance. In the decisions we have heretofore made we have applied simply the rules of the common law. * * * That new conditions and new facts may produce the novel application of a rule that has not been before applied in like manner, does not make it any less the common law. * * * Every Judge is bound to know the history and the leading traits which enter into the history of the country where he presides. * * * We must therefore know * * * that our citizens have gone upon the public lands continuously from a period anterior to the organization of the State Government. (Therefore anterior to the Swamp Land Act, that is, ever since 1849). "Upon these lands they have constructed ditches, flumes and canals for conducting water; built mills for sawing lumber and grinding corn; established farms; * * * diverted water-courses. * * * The State Government has not only looked on quiescently upon this universal appropriation of the public domain for all of these purposes, but has *studiously encouraged them* in some instances, and recognized them in all. * * * Ever since the organization of the State, among the other various enterprises, * * * is that which is brought in

“question in the case before us; the construction of
“ditches, flumes and canals for the purpose of conducting
“waters from their natural channels to supply the wants
“of gold miners.

“In like manner, as in other pursuits, the State Gov-
“ernment has looked on the progress of these works for
“the *past seven years*, until their extent has reached
“hundreds of miles, and every important stream and
“estate has been tapped by them; has referred to them
“in various legislative acts, and has annually made them
“the subject of revenue to the State. In *Irvine vs. Phil-
“lips*, * * * and several subsequent cases, we have
“recognized their right to appropriate the water, to di-
“vert it from its natural channel, where no riparian
“rights intervene.”

Conger vs. Weaver, 6 Cal., 555.

In *Maeris vs. Bricknell*, 7 Cal. 262, plaintiff in 1851 cut a ditch from a ravine and through it—actually diverted the waters of the ravine. In 1852 the defendant cut another ditch higher up and diverted the water from plaintiff's ditch. The Court below held that plaintiff's intention in constructing his ditch was immaterial if he was actually diverting the water before the defendant's appropriation, had not abandoned it, and that he, plaintiff, would not lose his rights by varying the use from the original objects. But the Supreme Court held that “possession or actual appropriation must be the test of priority in all claims to the use of water, whenever such claims are not dependent upon the ownership of the land through which the water flows.

“From this decision, it follows that there must be an
“*actual appropriation* * * * for some useful pur-
“pose allowed by law. In fact, merely turning the
“water from a claim with the intention to *dispense* with
“its use, is no actual appropriation at all. It also fol-
“lows * * * that until such actual appropriation
“there can exist no complete right to the use of the
“water, for the party may never carry out his intention.
“* * * If the ditch of plaintiffs was cut for the pur-
“pose of drainage, simply, and not for the *bona fide* in-
“tention of appropriating the water thus diverted to
“some useful object, and the ditch or ditches of defend-
“ants were commenced first in good faith, with the intent
“thus to appropriate the water, and before any actual
“appropriation by the plaintiffs or their grantors for

“ mining purposes, then the defendants gained a priority.”

Lord Campbell says, A. D. 1855, that flowing water is not the subject of property. “ Blackstone, following other elementary writers, classes water with the elements of light and air: vol. 2, p. 14. * * * For water is a movable, wandering thing, and must of necessity continue common by the law of nature. * * * While it remains in the field where it issues forth, in the absence of any servitude or custom giving a right to others, the owner of the field, and he only, has a right to appropriate it; for no one else can do so without committing a trespass upon the field.”

Race vs. Ward, 4 Ellis & Bl.; 708-9.

“ The first appropriator of the water of a natural stream has a prior right to such water to the extent of his approbriation.”

Schilling vs. Rominger, 4 Col. 103.

“ Where the climatic conditions are such as exist in Colorado, the right to convey water for irrigating purposes over land owned by another is founded on the imperious laws of nature, with reference to which it must be presumed the Government parts with its title; and although a patent from the Government may be silent in regard to conditions which, if expressly named, would have no greater force, it cannot be asserted that therefore they do not exist. (*Yonker vs. Nichols*, 1 Col. 551.) Subject to regulation by statute, and resting upon the law of nature, it is conceived that the right to convey water over another's land is inseparable from the enjoyment of the land which the United States conveys to its grantees. This right passes with the estate in the land as a necessary incident.”

Ibid, p. 109.

“ It is contended by counsel for appellants that the common law principles of riparian proprietorship prevailed in Colorado until 1876, and that the doctrine of priority of right to waters by priority of appropriation thereof, was first recognized and adopted in the Constitution. But we think the latter doctrine has existed from the date of the earliest appropriations of water within the boundaries of the State. The climate is dry, and the soil when moistened only by the

" usual rainfall, is arid and unproductive; except in a
 " few favored sections, artificial irrigation for agriculture
 " is an absolute necessity. Water in the various streams
 " thus acquires a value unknown in moister climates.
 " Instead of being a mere incident to the soil, it rises,
 " when appropriated, to the dignity of a distinct usufructuary estate, or right of property. It has always
 " been the policy of the National, as well as Territorial
 " and State Governments, to encourage the diversion and
 " use of water in this country for agriculture; and vast
 " expenditures of time and money have been made in reclaiming and fertilizing by irrigation portions of our
 " unproductive territory. Homes have been built, and
 " permanent improvements made; the soil has been cultivated, and thousands of acres have been rendered immensely valuable, with the understanding that appropriations of water would be protected. Deny the doctrine of priority or superiority of right by priority of appropriation, and a great part of the value of all this property is at once destroyed.

" The right to water in this country, by priority of appropriation thereof, we think it is, and has always been, the duty of the National and State Governments to protect. The right itself, and the obligation to protect it, existed prior to legislation on the subject of irrigation. *It is entitled to protection as well after patent to a third party of the land over which the natural stream flows, as when such land is a part of the public domain, and it is immaterial whether or not it be mentioned in the patent, and expressly excluded from the grant.*

" The Act of Congress protecting in patents such right in water appropriated when recognized by local customs and laws, 'was rather a voluntary recognition of a pre-existing right of possession, constituting a valid claim to its continued use, than the establishment of a new one.' *Broder vs. Natoma W. & M. Co.*, 11 Otto, 274. We conclude, then, that the common law doctrine giving the riparian owner a right to the flow of the water in its natural channel upon and over his lands, *even though he make no beneficial use thereof, is inapplicable to Colorado.* * * * * * And we hold that in the absence of express Statutes to the contrary, the first appropriator of water from a natural stream, for a beneficial purpose, has, with the qualifica-

"tions contained in the Constitution, a prior right thereto,
"to the extent of such appropriation."

Coffin vs. Left Hand Ditch Co., 11 Pac. Law J.,
419.

In the case of *Achison vs. Peterson*, 20 Wallace, 507,
the Supreme Court of the United States say :

"As respects the use of water for mining purposes, the
"doctrines of the common law declaratory of the rights
"of riparian owners were, at an early day, after the dis-
"covery of gold ('A. D. 1848') found to be inapplicable,
"or applicable only in a very limited extent to the neces-
"sities of miners and inadequate to their protection. *
"* * This equality of right among all the proprietors,
"on the same stream would have been incompatible with
"any extended diversion of the water by one proprietor,
"and its conveyance for mining purposes to points from
"which it could not be restored to the stream. But the
"Government being the sole proprietor of all the public
"lands, whether bordering on streams or otherwise, there
"was no occasion for the application of the common law
"doctrine of riparian proprietorship with respect to the
"waters of those streams. The Government, by its
"silent acquiescence, assented to the general occupation
"of the public lands for mining, and to encourage their
"free and unlimited use for that purpose reserved such
"lands as were mineral from sale and the acquisition of
"title by settlement. *And he who first connects his own*
"*labor with property thus situated and open to general*
"*exploration, does, in natural justice, acquire a better*
"*right to its use and enjoyment than others who have not*
"*given such labor.* So the miners on the public lands
"throughout the Pacific States and Territories, by their
"customs, usages and regulations every where recognized
"the inherent justice of this principle, and the principle
"itself was at an early period recognized by legislation"—
"that means by State legislation—"and enforced by the
"Courts of those States and Territories.

"*In Irwin vs. Phillips*, * * * after stating that a
"system of rules had been permitted to grow up with
"respect to mining on the public lands by *by the volun-*
"*tary action and assent of the population*, whose free and
"unrestrained occupation of the mineral region had been
"tacitly assented to by the Federal Government, and
"*heartily encouraged by the expressed legislative policy of*
"*the State*, the Court said : * * * So fully recog-

“nized have become these rights, and without any specific legislation conferring or confirming them, they are alluded to and spoken of in various Acts of the Legislature in the same manner as if they were rights which had been vested by the most distinct expression of the will of the law-makers. This doctrine of right by prior appropriation was recognized by the legislation of Congress in 1866.”

Every word of the foregoing, equally applies to appropriations of water on the public lands for agricultural purposes, and outside of the mineral regions.

It is frequently said, in the early California decisions, that it is not necessary to decide whether these lands belong to the State or to the United States; that that is immaterial, because in every case the proprietor, whether the State or the Government, had assented to this doctrine of prior appropriation.

In the case of *Basey vs. Gallagher*, 20 Wallace, 670, after quoting *Acheson vs. Peterson*, supra, the Court say: “The views there expressed, and the rulings made, are equally applicable to the use of water on the public lands for purposes of irrigation. No distinction is made in those States or Territories by the customs of miners or settlers, or by the Courts, in the rights of the first appropriator from the use made of the water, if the use be a beneficial one.”

In *McDonald vs. Bear River Co.*, 13 Cal., 232, the Court say: “The ownership of water, as a substantive and valuable property, distinct sometimes from the land through which it flows, has been recognized by our Courts. * * * The right accrues from appropriation. This appropriation is the intent to take, accompanied by some open, physical demonstration of the intent, and for some valuable use. We have held that there is no difference in respect to the use, or rather purpose, to which the water is to be applied; at least, that an appropriation for the uses of a mill, stands on the same footing as an appropriation for the use of the mines. * * * If, by the erection of a mill, and the possessory right of land on the stream, the water be acquired—this being evidence of the appropriation of the water—the right would pass, etc. It seems to have

been further held that though the appropriator, *for other than mining purposes*, took possession of a portion of the bed and banks of a stream, and erected a grist-mill, and thereby appropriated water for the use of the mill, he could not claim, as riparian proprietor, all the water of the stream, but only as much as he needed for his mill, and that "if there was an excess of water for this purpose, any other locator or proprietor is entitled to have it."

Ortman vs. Dixon, 13 Cal., 38, was the case of a ditch taking water for a saw-mill. P. C.—"We presume that it is not to be doubted that the defendants, having first appropriated the water for their mill purposes, are entitled to it to the extent appropriated, and for those purposes, to the exclusion of any subsequent appropriation of it for the same, or any other use. We hold the absolute property in such cases to pass by appropriation, as it would pass by grant. * * * If, for instance, a man takes up water to irrigate his meadow at certain seasons, the act of appropriation * * * would qualify his right of appropriation to a taking for a specific purpose, and limit the quantity to that purpose, or to so much as necessary for it. So, if A erects a mill on a running stream, this shows an appropriation of the water for the mill; but if he suffers a portion of the water, or the body of it, after running the mill, to go on down its accustomed course, we do not see why persons below may not as well appropriate this residuum. * * *

* The principle is not materially different when applied to the fact that the ditch of defendant was built above plaintiff's mill, and the water diverted so as to be carried out of the old channel or course; for, upon the ground suggested, plaintiff was only entitled to the water for the purposes of the mill. He was entitled to all, when all was necessary for the mill; but whenever the mill did not need, or could not use it for its operations, the defendant could use it for his purposes. * *

* It is not a question of priority as to two classes of appropriators, for we cannot draw any distinction between the mill-owner and the miner."

It seems that in *McDonald vs. Bear River*, 13 Cal., 232, the prior appropriator of the water not only constructed a grist mill upon the stream, but located 160 acres of land, embracing the water course.

So in *McKinney vs. Smith*, 21 Cal., 381, which followed *Ortman vs. Dixon*, it was held that the possession of the bed of the stream by miners only gives the right to the water actually appropriated, *i. e.*, necessary for the working of their claims, and that others may divert the residuum.

In *Smith vs. O'Hara*, 43 Cal., 374, the ditch was dug in 1851, *not* for mining purposes, but it seems to irrigate a vineyard, etc. The Court say: "It is not to be doubted that the person who first appropriates for mining or other purposes the waters of a stream running upon the public lands is entitled to the same."

In *N. C. & S. C. Co. vs. Kidd*, 37 Cal., 314, Sawyer, J., says: "In *Weaver vs. Eureka Lake Water Co.*, it was also held that a claim [to water] "for mere speculative purposes * * * would give them no right against subsequent appropriations. The doctrine is that no man shall act upon the principle of the dog in the manger, by claiming water by certain preliminary acts, and from that moment prevent others from enjoying that which he is himself unable or unwilling to enjoy, and thereby prevent the development of the resources of the country by others. * * * Canals for mining and other purposes often run side by side, even crossing and recrossing each other. * * * A party's right is limited to the general object for which it is acquired, and another party may acquire another right for similar or other objects not in conflict with the prior right."

And Sanderson, J., says (p. 322): "Too strict an application has been made of the rules of the *old* common law * * * to the acquisition and protection of water rights in the mineral regions of this State. Those rights are, to a considerable degree, *sui generis*. They are in a great measure the growth of this State, and are founded upon conditions which are in many respects strange to the old common law. Too close an application of the rules of the common law in vogue under different circumstances leads to mischief rather than a just settlement of legal controversies. Such rules must be modified to meet the exigencies of the changing pursuits of the people; or, in other words, a loose rein should be given to the spirit of the common law, that it may adapt itself to the new conditions and relations with which it has been called upon to deal in this State. * * * The greatest beauty and crowning

"glory of the common law is its adaptability to new conditions."

Rupley vs. Welch, 23 Cal., 455, is also a clear California State authority that by the State laws, State action and State decision the doctrine of appropriation, and not *that part* of the English doctrine of riparian rights which forbids the diversion of a running stream to distant points by other than riparian proprietors, is, and ever was, the law of California, and does apply equally to appropriations for agricultural purposes, irrigation of gardens, fields and trees, etc., as to appropriations for mining purposes; and fully sustains the statement of Judge Field, that *that part* of the modern English law is, and ever was, *inapplicable* in California, so far as the public domain is concerned.

So in *Butte vs. Vaughn*, 11 Cal., 153, Judge Field says: "The first appropriators of the water of a stream passing through the public lands in this State has the right to insist that the water shall be subject to his use and enjoyment to the extent of his original appropriation, and that its quantity shall not be impaired so as to defeat the purpose of its appropriation. To this extent his rights go, and no further." And finally, in the *Osgood* case, this Court say: "The principle of prior appropriation of water on the public lands in California, where its artificial use for agricultural, mining and other like purposes, is absolutely essential, which has all along been recognized and sanctioned by the Supreme Court of the United States," etc.

In *Broder vs. Natoma Company*, 11 Otto, 274, the point involved was that the Central Pacific Railroad Company claimed a grant from the Government of a date anterior to the passage of the law of 1866, the party claiming water claimed by an appropriation which was prior to this alleged grant to the railroad from the Government; and the question of course necessarily was raised which was raised in *Van Syce* against *Haynes*, the railroad company saying the Government has never given any title to this land before, and that no Statute of Limitations could run against it; that the railroad company became just what the Government was at the time of the first appropriation, and therefore were entitled to the water. As to the law of 1866, the company said:

"You cannot rely upon that Act, because our rights had vested by transmission of the title before the law of 1866 was passed, and Congress was powerless to divest or take away by any act of subsequent legislation the rights already vested in us."

The Court held that the case must stand exactly as if the law of 1866 had never been passed, and the result is that the man who first takes the water is entitled to it as against the man who afterwards gets from the Government the dry bed from which the stream was diverted. And this upon the express principle that the State had substituted appropriation for riparian rights. So that legislation by the State, or tacit acquiescence of the State, operates in favor of the prior appropriator of the Calloway just as the tacit acquiescence of Congress operated when the question was to the land of the General Government.

Judge Miller said: "It is the established doctrine of this Court that rights of miners who had taken possession of mines, and worked and developed them, and the rights of persons who had constructed canals and ditches, to be used in mining operations and for purposes of agricultural irrigation in the region *where such artificial use of the water was an absolute necessity*, are rights which the Government had, by its conduct, recognized and encouraged and was bound to protect before the passage of the Act of 1866." And in *Jenison vs. Kirk*, 98 U. S., 458, they say: "The doctrines of the common law respecting the rights of riparian owners were not considered as applicable. * * *

"The waters of rivers and lakes were consequently carried great distances in ditches and flumes, constructed with vast labor and enormous expenditures of money, along the sides of mountains and through canyons and ravines, to supply communities engaged in mining, as well as for agriculturists and ordinary consumption. Numerous regulations were adopted, or assumed to exist, from their obvious justness, for the security of these ditches and flumes and the protection of rights to water, not only between different appropriators, but between them and the holders of mining claims. These regulations and customs were appealed to in controversies in the State Court, and received their sanction. * * *

"An l properties to the value of many millions rested upon them. For eighteen years—from 1848 to 1866—the regulations and customs of miners, as enforced and molded by the Courts and sanctioned by the

"legislation of the State, constituted the law governing properties in mines and in water on the public mineral lands. * * * The Legislature of California had wisely declared that the rules and regulations of miners should be received in evidence in all controversies respecting mining claims; and when not in conflict with the constitution or laws of the State, or of the United States, should govern their determinations; and a series of wise judicial decisions had moulded these regulations and customs into a comprehensive system of common law, embracing not only mining law, properly speaking, but also regulating the use of water for mining purposes."

It follows from the foregoing that by the action, acquiescence and legislation of both the State and National Governments, the waters on the public lands have been dedicated to the uses of appropriators from a period ante-dating the organization of California.

Gillan vs. Philadelphia, 3 Wall., 721.

Regina vs. Eastmark, 11 Ad. & Ellis, N. S. 1882.

Shaw vs. Crawford, 10 Johns, 237.

1 *Bowyer Law Dict.*, 443.

Cincinnati vs. White, 6 Peters, 437,

Washburne on Easements, 137-138.

Heerman vs. Beef Slough Co (1 Fed. Rep., 145), is especially in point, applying in favor of the lumber and logging interests of Wisconsin, the same principles which we seek here to apply in favor of irrigating desert lands, and upon the same principles. The Court say :

"In the light of these precedents and statutory authorities in connection with an extensive and uninterrupted usage coeval with the existence of the State, we do not hesitate to hold that the use of the Chippewa River by the public as a highway for the transportation of logs and lumber is a right common to all, recognized and protected by the municipal law, and that such right must continue so long as the public have any need of its exercise, unless changed or abrogated by the legislature of the State, or by Congress. And there is no reason why it should not be so."

A stronger analogy is afforded by the course of decision in regard to the admiralty jurisdiction of the United States. At first, adhering technically to the common law definition of navigable rivers, and applying the criterion of the ebb and flow of the tide, the only one known to

the common law, the Courts held that the grant of jurisdiction could not be construed to extend to the great fresh water rivers and lakes of this country where the tide did not ebb and flow.

In a late opinion of the Supreme Court of the United States, Judge Bradley said that an attempt to comply with a technical rule without reference to the reason of the rule or its origin, sufficed to prevent the attaching of the admiralty jurisdiction of the Federal Courts over such rivers as the Mississippi above where the tide ebbed and flowed for a quarter of a century. But afterwards more comprehensive views obtained, and upon the principle that the common law to that extent was here inapplicable, and the reason of the rule having ceased, a different rule was adopted and now obtains.

We have then two opposing views on this subject: one, that we adopted the common law; that by the common law the owner of land bordering on or enclosing a water-course, as riparian proprietor is entitled as of right to the flow of the water uninterrupted and undiminished, regardless of his desire or capacity to put the same to any beneficial use whatever. That this right to the water, by reason of the technical rule of the common law thus construed, to be adopted in all its rigor, is, strictly speaking, appurtenant to the land, is annexed to the land, is an incident to the ownership of the land, belongs as much to and is as inseparable from the land as the trees growing upon or the stones resting on it.

On the other hand, we have a view so sustained by authority, that to this extent the common law was not adopted because inapplicable to the public lands of California; that in its place the doctrine of prior appropriation to beneficial uses prevailed; and that all grants and patents must be construed in accordance with this universally recognized principle, and by the laws, usages and customs existing at the time of the grant in relation to the subject matter of the grant.

This principle was applied by the Supreme Court of the United States in the case of *Heydenfeldt vs. Daney Company*, 3 Otto, 637. In that case, the Statute to be construed read as follows: "That Sections 16 and 36 in every township, and where such Sections have been sold or otherwise disposed of by an Act of Congress, other lands equivalent thereto, in legal subdivisions, of not less than one-quarter section, and as contiguous as

"may be, shall be and are hereby granted to said State for the support of common schools."

According to the letter of this Statute, there was a grant *in presenti* which would override any subsequent sale or disposition by Congress. But, construing the Statute in the light of the surrounding circumstances, the history and customs of the locality, and the local laws and wants, it was held that, though literally construed, the words of the grant referred to past transactions, evidently they were not employed in that sense; but until the status of the lands was fixed by the survey, and they were capable of identification, Congress preserves absolute power over them.

See to the same point:

Wedekind vs. Craig, 56 Cal., 646.

Ivanhoe Co. vs. Keystone Co., 1 Morrison's Transcripts, 134.

The case of *Atherton vs. Fowler* establishes the same principle, the pre-emption patent being construed with reference to the history and condition of the country and the policy of the Government, in the light of which policy language otherwise bearing that interpretation was held not to include land already in the possession of another.

Applying this principle of construction, it cannot be held that either the General Government, in granting the swamp lands to the State, or the State in granting these lands to purchasers, intended to pass as appurtenant to them the modern English riparian rights. The fair and reasonable presumption is, that it was intended to pass the land alone, and leave the water subject to the general doctrine of appropriation adopted in preference to that of riparian right for wise and permanent public purposes and reasons. Because if it was wise in the first place to reject the modern English doctrine of riparian right, it was equally wise not again to restore that doctrine upon the alienation of the public domain. The policy inaugurated, was not a temporary one, but a permanent and enduring policy. The reasons for its adoption in the first place, applied in favor of its retention afterwards; and the mere fact of the sale of the land furnishes no reason why, after the sale, a different doctrine in regard to riparian rights should obtain, than obtained before the sale. Especially is this so in regard to lands like those in question, which were granted by the

General Government, because the water upon them was a nuisance in its then condition, and were granted upon the express condition that this water should be removed by the State in the reclamation of the land.

"By accepting the grant, the State assumed the duty and obligation of draining the land acquired by it."

State vs. Milk., 13 Reporter, 709.

It is not to be presumed that in passing laws for the disposition of this land, and intending to drain them, a principle was adopted which, as appurtenant to the land, should give to the purchaser the right to the unobstructed, undiverted and undiminished flow of the very water which it was his duty to take away.

If the law of 1866 has been properly construed, in so many decisions to protect prior appropriations, thereunder, as against subsequent patents, so for the same reason the swamp land grant, and the State laws passed thereunder, should be construed, not to displace or effect the principle, the doctrine of prior appropriation, or to work a change in the law of the State upon that subject. Especially should not these laws and grants be construed to give any vested right as against appropriations made before the issuance of the patent by the State, to parties holding a mere certificate of purchase; to parties who not only have made no appropriation of the water, but who may never even carry out their intention to acquire the land by making final payment, and obtaining the patent. At the very least, while the title remains in the State, until the purchase has been fully consummated and the right to the patent vested, the water should remain subject to appropriation under the laws of the State, as of other public and unclaimed lands.

Before any rights were acquired from the State, the law of the State was that "*the legislation of the State has given to every one, not only a privilege to work the gold placers, but also to divert the streams for this and other purposes. The legislation of the State has been held to amount to a general license to all.*"

Hill vs. King, 8 Cal., 338.

The principle and reason of the whole, as set forth in the Osgood and similar cases, is this, that the owner of land through which flows a water-course, while he owns it all, both the dominant and servient tenements, as the books phrase it, has the right, as owner, and nobody else

being interested, at his will and pleasure to dispose of and alter and change the relative relations of the different parts of land, one to the other. If I own all the land from the source to the outlet of a given water-course, and on both sides of it, all the way down, I can, as long as it belongs to me, and I alone, have any interest in it, divert a portion or the whole of it away from the channel and carry it anywhere I please. I can take a part to this house—use a part on that park: I can take a part to this mill; I can take the rest in a different direction, and nobody can complain; because, of course, nobody else has any interest to be affected. Now, then, if after having done that; if after having thus fixed these qualities and relationships upon the land, I sell one parcel, or several parcels, my grantees take, subject to all that I have done; and if I have already taken part of the water out in one direction, the grantee of the old dry bed that I have left, cannot complain and say that either I or my grantee must put it back there again.

The law on this subject is thus expressed:

“The owner of real estate has, during his ownership, entire dominion and control over its various natural qualities, and may dispose of and arrange them at will. He may alter the natural distribution of those qualities so as essentially to change the relative value of the different parts. * * * The principle is, that when the owner of two tenements sells one of them, or the owner of an entire estate sells a portion, the purchaser takes the tenement or portion sold, with all the benefits and burdens which appear at the time of the sale to belong to it, as between it and the property which the vendor retains.”

So, the Government of the United States, being the owner of all this land, had the right to do just as it please with the land, and the mines, and the ores, and the water, and every constituent making up the sum total of the public domain. Having the right to do what they pleased with it, what did they do as shown by the history of the country and by the decisions of the Courts? They adopted that doctrine above quoted from Blackstone. They repudiated this modern doctrine of riparian rights. They said, there has grown up in California a different principle, and we adopt that principle as the law of the public lands.

In other words, the law of 1866, being construed as the Supreme Court of the United States has construed it

merely as a recognition of what already existed, and not as the creation of any new principle or right, must be interpreted just as it would have been interpreted if it had said, with a preamble:

"Whereas, on the public land of this Government, in the State of California a condition of climate exists which renders it impossible to apply the English doctrines of riparian law; and whereas, in consequence of the physical condition of that country, a customary law, a California law, has been allowed to grow up, which repudiates the doctrine of riparian rights—which has replaced it with the doctrine of prior appropriation; and whereas, in California, the artificial use of water for mining and irrigation is an *absolute necessity*, and the equality of right recognized by the later common law authorities, is incompatible with any extended diversion of the water; and whereas, in natural justice the actual appropriator has the better right; *therefore*, be it enacted, that vested and accrued rights to the use of water, recognized by custom and decision in the State and by the State, shall be protected."

No one would deny that such a statute would have been equivalent to one expressly abrogating and denying all riparian rights, inconsistent with the doctrine of appropriation; and that therefore the pre-emption and other land laws must be construed *in pari materia* with such statute, and that a pre-emptor would take by his patent, subject to all future appropriations. Such a denial would be a negation of the acknowledged right of the proprietor of both the dominant and servient tenements, before severance to destroy all easements and relations between them at his will and pleasure. But, substantially, the law of 1866 is the same as the statute with preamble above supposed—for the former *implies* all the latter *expresses*.

If the statute has said that in so many words, as a necessary result, no party who had purchased from the Government at any time after this custom grew up, that is to say, any time after the settlement of California, could ever be heard to complain, or to set up a complaint, or claim founded on riparian right, any more than the man who has purchased one parcel from the proprietor who owned the whole water-course and had diverted a part of it, could come along and complain, and say that it must be brought back on to this land, although he had bought it after the owner had destroyed the riparian relationship between one tenement and the other.

Now, then, this Act of the Congress of the United

States, this working out of this result. and this chrystalizing and perpetuating and making permanent this customary law, this abrogating of this riparian law, was worked, how? Not by the direct act of the Federal Government, except merely in its recognition and approval of what others had and have done. The Federal Government, as a Government and as proprietor of this land, did not itself inaugurate this system, did not itself abrogate this riparian law of England, so alien and destructive in this country. But it found that the State of California, as a State, as a people, had done this thing, because they were forced to do it, and the Government of the United States simply sanctioned, and approved and adopted what the State of California as a State and as a people had done.

Now, then, does it not follow absolutely, mathematically to a demonstration, that, if, because of this recognition of the State doctrine and the State abrogation of riparian rights by the General Government, those riparian rules were no longer applicable to the Federal domain and as between the successive grantees of the Federal domain, therefore *a fortiori* those doctrines of riparian rights could no longer be applicable as between the successive grantees of the State to State lands thus, in the first place, and before the action of the Federal Government, and equally, and for the same reasons of policy and necessity and right, and for the same purposes, affected by the principle of appropriation to the exclusion and abrogation of the principle of riparian law which is superseded and abrogated? That amounts to a demonstration that if, by this sanction and acquiescence and subsequent approval by the Federal Government, the riparian law ceased to be a law of the Federal public land, *a fortiori* by the sanction and by the action, by the affirmative action of the State, by the inauguration of this system on the part of the State, before being sanctioned by Congress, that same result followed as to the State lands; and must work the same result as between the prior appropriators of water flowing over the State lands, and subsequent State purchasers of those lands thus affected by this prior appropriation. And a further result follows, that when you come to interpret a patent from the General Government, or a patent from the State of California, for Government lands or State lands, as the case may be, in either case you must construe the patent, not by the common law which the grantors of that land had before repudiated and cast off and condemned, but by

the law of prior appropriation which that grantor had sanctioned and affixed to the land, before the making of that patent. When you construe the deed of the Government you construe it in the light of the existence of the wise and just principle of prior appropriation, and not by the principle of riparian right. When you construe the patent of the State, and seek to find out what the State has granted by that piece of paper, you construe it not in the light of exploded and rejected principles of common law, but in the light of the living principle of prior appropriation, by the proper authority, by the owner of that very land, affixed to that land before giving it away.

To return, for a moment, to our Civil Code:

There is a construction of that Code, which, though differing somewhat from that already given, was urged upon your Honors on the oral argument, and which we deem well worthy of your consideration. A construction, however, which is only urged in the event that, after due consideration of the statute laws, decisions and customs of our State, your Honors, differing with us, hold that, so far as the public lands are concerned, these modern English riparian rights, or rights akin thereto, did at one time or another prevail in California.

When the State of California enacted the Civil Code and provided that that portion thereof relating to water rights (Sections 1410 to 1422) should take effect on the 1st day of May, 1872, it was then the owner of large and vast tracts of land within its borders, and as such owner, was fully competent to legislate relative to, or make such disposition of, the land or any actual or technical part or portion of the land, or the appurtenances to the land, or the easements and privileges it then enjoyed by reason of its ownership of the land, as it saw fit; and by the Act of Congress of 1866, it was equally authorized and empowered to legislate as to and make disposition of the non-navigable waters flowing upon the Government lands.

We have already seen that though the greater portion of our Civil Code was copied, almost bodily, from the proposed Code of the State of New York, that portion thereof relative to water rights—riparian or by appropriation—differed radically from the provisions upon the same subject which had been incorporated into the New York Code. This radical departure, on this one subject, from the model our Commissioners

had adopted and our legislators approved, shows clearly that the change was made with set purpose; that the attention both of the codifiers who framed and of the legislators who enacted the Civil Code was particularly directed to that portion thereof relating to the rights of riparian proprietors and to the acquisition of rights to flowing water.

Turning now to the law thus enacted, we find that by Sections 1410 and 1411 the right to the use of running water flowing in a river or a stream, or down a canyon or ravine, may be acquired by appropriation, with but the sole proviso that the appropriation shall be for some useful or beneficial purpose, and shall cease when the use ceases. Here we have an express declaration that the waters of rivers or streams upon the public lands, State or Federal, may be appropriated; a declaration tantamount to a dedication of those waters to the public, to the people; a permit, a license, to whosoever will, to go upon the public lands and there divert and take the water for any useful or beneficial purpose; a premium offered to enterprise and industry. Here was a severance from the land, a renunciation, termination, and total destruction of the easement—the right of the land to the flow of the water—and once severed, it could never again attach. By its Civil Code the State announced that, whatever may have been the rule, the law, or the custom theretofore, from that time forth the water and the land were separate and distinct subject-matters of property right, and that when, thereafter, the State or the Federal Government sold or disposed of any of the public lands, it was and should be with the distinct understanding that such sale carried with it no interest in or right to the water flowing upon the land.

Whosoever, then, entered upon or acquired a part of the public domain at any time after the 1st day of May, 1872, did so with the full knowledge that he acquired no right to the water flowing thereon; that the old, useless, idle, riparian right, if it had ever existed, was now no part of his acquisition; that if the water were there and he desired to use it he, like any other, might take it, use it, and, so long as he made a beneficial use of it, retain it to his heart's content, but that he could no more sit by in sullen selfishness watching it flow to utter waste.

But, it is said, Section 1422 provides that the rights of riparian proprietors shall not be affected by this severance of the easement from the land. In this view

we may admit, for the sake of argument, that the rights of riparian proprietors *then existing* were not affected. If any such *then* existed they were vested rights of property with which the State did not pretend to interfere. It was not legislating relative to private property or private rights *then* in existence; but was legislating relative to its own lands, which it well might do, and the lands of the United States, which, by the Act of 1866, it was authorized to do. It was inaugurating a new policy (assuming for sake of argument, that such had not always been its avowed policy); a policy to apply to all the then State or Federal lands, whether they afterwards came into private ownership or not.

It has also been suggested that, when reduced to private ownership, this severed easement might again be restored to the land by lapse of time. To this we say, No! Unless the owner of the land makes use of the water, himself applies it to some beneficial purpose, he acquires no right thereto, nor does the right to its flow ever again become a part of his land, no matter for how long a time it may have been running idly by. Mere idle waste creates no easement, vests no right. Use, beneficial use, has supplanted the old fiction, and now become the sole criterion of the right. Such owner has taken his land after the Code went into effect, and therefore knows that the policy of the State, enunciated in that Code, is to prevent useless waste—to develop its resources by so bestowing this life-giving element as to produce for itself and for its people the greatest possible returns.

C.

The finding against the prior possession of plaintiffs is well sustained by the evidence and by the law.

To the reasons already given under the headings "Plaintiff's Title" and "Plaintiff's Possession," we add:

The evidence of possession consists of the introduction of a deed from Baker and others, executed in the year 1870, and purporting to convey a portion of the land described in the complaint. There is no

proof in this case that any consideration was paid by plaintiffs upon the purchase evidenced by that deed; and the law is well settled—it is almost elementary law—that as against third parties the recital in the deed is not evidence of the payment of any consideration. Consequently, upon the axiom that as to those things which do not appear and those things which do not exist the rule is the same, we must assume in this case, as a matter of fact, for all the purposes of the case, that this was a voluntary deed, and that no consideration whatever was paid by the grantees to the grantors. Further, there is no pretense of evidence that the grantors in that deed themselves had any title or claim of title whatever to the lands conveyed. The purpose of the introduction of that deed was evidently this: that by a doctrine which is maintained by some of the authorities, a party who enters into possession of real estate under claim and color of title, who enters under a deed which purports to convey the property by metes and bounds specifically, although he takes actual possession of only a part of the premises conveyed, acquires constructive possession by intendment of law to the boundaries of the deed as against a party without title and without possession. That doctrine was laid down to a somewhat extravagant extent in the earlier cases in California. In the case of *Hicks against Coleman*, in 24th Cal., the broad doctrine was laid down that a party who entered in good faith under a deed describing the premises by metes and bounds, and took actual possession of a part, was to be deemed in law to have constructive possession of the whole. But the doctrine of that case has been changed, qualified and restricted by the later California adjudications. Among those is the case of *Wolfskill vs. Malajovich*, 39 Cal., p. 276, and the earlier cases there cited and relied on.

The doctrine of the State of California, as established by these later cases, may be thus stated: It was found that the doctrine of *Hicks against Coleman* was too broad and liberal a doctrine, and led to practical inconvenience and injustice; that, to hold that a party could get what was practically a fee simple title to public lands, without any real belief of title, without any foundation of right whatever, by merely procuring some one else, without consideration, to execute to him a deed, even if he put that deed upon record, as was the case in *Hicks against Coleman* and was much relied upon in that case, would be a dangerous

doctrine, and an unjust doctrine, because it would allow a party to absorb and monopolize large tracts of public land, without that *bona fide* and actual application to beneficial purposes which is a cardinal feature of our land law, and runs throughout the whole of that part of our jurisprudence. Consequently, in *Wolfskill vs. Malajovich*, and the other cases, that doctrine was modified and qualified and restricted, and it was laid down that a party must enter in good faith, believing, and having a right to believe, that the conveyance under which he entered did convey to him the title legal or equitable, and the right to the premises in question. In that case it was attempted to comply with the Possessory Act, which provided a method of acquiring a constructive, as distinguished from an actual possession of the public lands, the party who attempted to comply with the Possessory Act did not comply with it, but he took a deed from some one else who had no title whatever, describing a large tract by metes and bounds, and although he entered into possession of a portion of it under that deed, he was held in that case not to have any constructive possession, or any possession whatever, of the part of the tract outside of his actual *bona fide pedis possessio*; and the Court say, that where the land is public land,—as all land is presumed to be in this country in the absence of contrary testimony,—where the land is public land, the fact appearing that a deed was made, and it not appearing that the grantor had title, the presumption is that the party knew he had no title, because he is presumed to know the law; and that the doctrine of constructive possession would not apply to him.

Applying here the doctrine of these later cases, it is perfectly evident that no constructive possession was acquired by Miller, Lux or Crocker, under the deed from Baker; because there is no proof that they had any reason to believe that deed conveyed title. There is no proof of the payment of any consideration for the purchase; there is no proof whatever of any title, legal or equitable, in the grantors in the deed. Besides, the testimony shows they could not have entered *under* the deed, for their entry, if prior to their patent they entered at all, was in 1869 when Crocker bought the cattle and “turned them into the swamp,”—a year before the deed was made. But if all that were not so, and if as to a portion of the land, that portion which comes through the Montgomery title, they could

claim that there was some ground, some reason under the Montgomery Act, for a *bona fide* belief on the part of the grantees in that deed that they were acquiring some title from the State, that could only be of a portion of this land divided off, as your Honors will see by an inspection of Diagram D (*ante*), into a series of sections not connected together, and not making a continuous tract or parcel of land. We contend that under the Montgomery Act, construed as it was in the case in the 16th of California, *Collins vs. Montgomery*, there was only a grant upon conditions precedent, and not upon conditions subsequent. And there is not the slightest scintilla of evidence in this case tending in the least degree to prove a compliance with those conditions precedent. Consequently, their case falls, even as to that part of the land strictly within the modified doctrine of the later California cases.

But in addition to all that, there was no proof here, meriting the name of proof, of any taking of actual possession of any portion whatever of this tract of land. All the proof upon that point is the testimony of Mr. Crocker himself. When Mr. Crocker first came upon the stand he testified distinctly and positively that, in the year 1871, there was flowing from Buena Vista Lake to Tulare Lake, and throughout the whole extent of this swamp, a well-defined, continuous, plentiful, body of water; that the water was flowing all the year through; that it was a wet year, and no scarcity of water whatever. That was Mr. Crocker's testimony when he first came upon the stand, before he left the stand and again came back to alter, amend and revise his recollection on the subject. At that time Mr. Crocker was evidently testifying in view of the then theory entertained by counsel for the complainants as to the case they were going to present to this Court of Equity, to-wit; that there had been a plentiful supply of water running through that water-course from Buena Vista Lake to Tulare Lake always, in all seasons, up to the year 1876. The case they sought in the beginning of the controversy to place before the Court as the truth, was, that the taking out of the water by these canals, in 1876, and later, was the sole, and the moving, and the prime cause of any subsequent scarcity or deprivation of water. That was the case they started out with. That was the case they intended to make. That was the case they attempted to establish in the earlier part of the investigation. But that, as in other instances in this case, they utterly

abandoned. The facts would not justify it, and it was entirely abandoned before the close of the testimony.

Now, then, while that was the theory, Mr. Crocker—and mark you, Mr. Crocker stands within the category, spoken of by appellants in their Points and Authorities, of those men to whose testimony so much credence must be given; those men who were not sent to this water-course to hunt for facts; those men whose experience was not limited to a casual investigation made upon a trip of several days, but who had lived on this water-course, who were interested in these premises, who had every opportunity and every incentive to know and be able to tell the Court the exact and accurate truth as to the matters involved—that gentleman, armed with those means of knowledge, came upon the stand, in view of the then the ry of the plaintiff, and positively asserted as, of his own knowledge, that that was the condition of affairs there in 1871. Afterwards, when he comes back, when it is found that theory won't work, that there must be a modification, a change of base, he states with equal positiveness and emphasis that that was not only not a year when the water flowed freely through that swamp, but that it was such a dry year that he was compelled to erect pumps and dig wells in order to keep his cattle from dying for want of water. Now upon this change of recollection, upon this simple assertion of this interested witness, stands for its basis the whole superstructure of asserted possession prior to the acquisition of title from the State. He knows that he took possession. Why? Because he knows that was a dry year, and he knows that that year he had to go to work and dig his wells and rig his pumps to supply water for his cattle. Now we say that such testimony as that cannot avail in a Court of justice where important property rights depend upon a correct determination of questions of fact. He is not borne out in his testimony, when it is properly analyzed and considered, by one single other witness who has testified in the case. It is true Mr. Tracy, an old gentleman whom we believe to be an honorable and an honest man, and who intended to tell the truth here as far as he knew it, did say he believed there was pumping done in 1871; but that was the mere expression of the belief on the part of Mr. Tracy, and he did not pretend, as Mr. Crocker did, to be certain and positive in his recollection on that subject. More than that. In at least a dozen other instances, if your Honors will read the testimony of Mr. Tracy, you will

see that, honest and well-meaning though he was, in other matters in regard to which he testified, concerning the stages and the condition of the water in various seasons while he was there and had opportunities to observe, he made still grosser mistakes and involved himself in the most apparent contradiction; and, taking his testimony all through, taking the mistakes he made where he attempted to speak positively, we say that no weight whatever can be attached to his mere statement in regard to the pumping in 1871, made as he made it so cautiously and merely as an impression, and not as a positive recollection. Then they called a witness named Lewis, a witness who, from 1870, perhaps, on until later years, had been attending cattle there for some outside parties in San Luis Obispo County. That witness also stated, but on cross-examination alone, that he *supposed* there was pumping done there in 1871, though he had nothing to do with the cattle there that year. But on his direct examination (T. II. fol. 1044) he says there was water there that year; water in ponds in the slough.

That is all the testimony as to this pumping in 1871. Mr. Crocker states it in the way in which we have detailed; these other witnesses state in the way in which we have explained, and that is all the testimony on the part of the plaintiff to convince the Court that there was any pumping done there in the year 1871. On the contrary, Mr. Murray, a witness whom the counsel seems to think was so honest that we did not dare to question him on the subject of the continuity of the channel—a witness who was as familiar with this matter as any man who has been called on this stand could have been, tells you that there was no pumping done during that year, and if there had been, he most certainly would have observed it. We say, then, upon the consideration of all the testimony, which should be considered as evidence in this case, *there was no pumping done in the year 1871.*

Now, what other testimony of possession have they except the testimony of Mr. Epperly, that in 1870 he went there with his hogs, to raise hogs upon that swamp; and that it was understood between him and Mr. Crocker that he should have the right to run his hogs on that portion of the swamp, in consideration that he would, when he saw any of Mr. Crocker's cattle in distress, go to work and relieve them? He says Crocker paid him nothing for doing that. When he did other work for Crocker he got money for

his work. Now, that statement, on the face of it, intrinsically and inherently, is incredible. The idea that in the state in which that country was in 1870, when, as all the testimony in this case shows, men from all parts of the country, without question, without let or hindrance, at their own will, were running their cattle and hogs all over that swamp; when it could not be that any man, although he owned the fee simple of the whole swamp, could have any reasonable objection to any body going there and running his hogs—the idea that at that time, any such bargain as Epperly speaks of was made, is something that simply cannot be, for a moment, entertained by any reasoning mind: “He would go and take out Crocker’s cattle if ‘he found them bogged!’” Why, look at it: Here is a man building a little hog corral, who is going to confine his operations to a space of some 8 or 10 miles along this big swamp. That Mr. Crocker, a man who kept his vaqueros, who was a cattle man, who had thousands of cattle all over this country everywhere, would take the pains to make any agreement with that man Epperly that he would perform the common neighborly function of assisting any stray steer he happened to find in distress right under his eyes, and that that would be the foundation of a lease, and create a pivity of tenure, and the relation of landlord and tenant, and work out a possession of this land, is too absurd to require further notice or illustration.

But take it all, believe it all—taking it for what it is worth, it don’t come within any reported case that ever was heard of in the way of establishing a possession of land. In the first place, all of this land was divided up, or, more correctly speaking, on the face of the deed assumed to be divided up into segregated subdivisions; and every single authority in the books in California and elsewhere holds, as the Code in effect says, and the statute before it said, that where the land described in the conveyance in question is subdivided into various parcels, the possession of one part of that land shall not be deemed a possession of any other part of that land.

Though we have already shown (*ante*, “Plaintiff’s Title” and “Plaintiff’s Possession”) that the swamp was not subdivided at the time of the pretended conveyance from Baker and others—in fact, was not subdivided until 1877—still the conveyance, if it is to be operative at all, must be operative upon the theory that these subdivisions existed, in contemplation at

least; because the conveyance is not of a tract of land by metes and bounds describing the exterior boundaries of the swamp, but is a conveyance of those particular parcels named by sections, range and township; consequently the whole foundation of the possession is, that there was a conveyance of a subdivided tract of land, and consequently those decisions and that statute which hold that the possession of one part cannot be the possession of all, apply fully and perfectly to the conveyance here in question. All the cases hold that where in a deed the property is described by subdivisions, as this is, that the possession of one portion or one subdivision is not a constructive possession of the rest, no matter how full and actual that possession may have been. Then how can plaintiffs work out any possession here? They have not proved that they went upon any one designated specific section or quarter section of that land. The proof is simply that Crocker carried his cattle, as everybody else did, down to the edge of the swamp and turned them loose, and he says they ranged from Tulare Lake to Buena Vista Lake and further; just as everybody else's cattle in that country ranged. Now we say that is no possession of any one particular piece, and if it were, if you could spell out from the testimony that it was a possession of one or more of those subdivisions, by reason of this rule of law, you could not extend that possession beyond that particular subdivision to which it referred. More than that; a party who seeks to prove a possession of public land has the burden upon him to prove specifically what he possessed. He cannot come in generally and prove: "I turned my cattle loose. I think that they might have gone on this section. I think that probably from their habits they would have wandered over that section; and, therefore, this Court must infer and assume that there might have been some kind of actual possession;" and then from that by some process of reasoning and intendment, extend that into a constructive possession of a much greater portion.

But apart from that, there is other evidence in this case which wipes out all the foundation for any claim of possession here whatever. And that is this: In order to maintain a constructive possession of land, the first and cardinal requisite is that the deed shall describe, by specific metes and bounds, some particular piece of ground. This deed does not do that. In their

opening, plaintiffs called an old gentleman who had formerly been a United States Surveyor. We ask your Honors to read *in extenso* the evidence of Mr. Gibbs on this point; to observe the manner in which that examination was conducted, and draw your own conclusion about a case which has to be made out as this was attempted to be made out through Mr. Gibbs. We ask you to observe the effort which was made and persisted in, to induce that old gentleman to swear that he did, in making out the plats introduced in evidence, made out by him, lay down the subdivisions of that swamp land from the United States plats of record, on file in the United States office. If he was not made to swear to that, he was made to swear so nearly to that, that it would be a close question of argument whether he did not swear to it—whether the impression was not sought to be made upon the mind of the Court, by his testimony, that the old gentleman went to the United States official records of surveys on file, and copied from them these lines which he puts on the plat made by him, and which plaintiffs introduced in evidence. And why was that done? Of course, to bring this case within these decisions as to constructive possession; to comply with that requirement of the law that a deed, in order to be the foundation of a constructive possession, must describe by metes and bounds specifically a certain tract of land. Because the language of that deed of 1870 was about this: Section so and so, range so and so, township so and so, as designated and laid down on the official plats of the United States survey. That was the language of the deed. And if your Honors will read that testimony, you will find that that was the language of Mr. Gibbs, in response to the leading questions of the counsel. Now, if it had been left there, it could have been claimed here, perhaps, that they complied with that principle of law, that they have shown a deed which did describe the land by specific metes and bounds. But when we sent for Mr. Gibbs, and put him back upon the stand, he told us what was the truth in that regard; he told us that his maps which he introduced in evidence were not copied from anything which appeared of record in the Surveyor General's office or on the surveys of the U. S. Government, and that it could not have so appeared, because it was not upon the originals on file in that office. The whole foundation for this plea falls right there, with the exposure of that attempt to represent that the Government plats did show these lines. Now,

as it stands, as the proof shows, there is not a tract of land on the face of God's earth that can fill and satisfy the calls of that deed. It calls for those sections as designated on official surveys of the United States Government, and refers to those plats on file; and as the proof here shows, there is no such land in existence.

Then this claim of possession falls exactly within the case of *Hess vs. Winder*, 30 Cal. 346, a mining case, where it was decided that in order to maintain the constructive possession of public lands, the deed itself must contain such a description by metes and bounds as can be located and identified; and this deed does not contain it.

One main reason why the case of *Hicks vs. Coleman* had to be modified by the later California cases was the obvious facility with which the earlier doctrine could be prostituted, to the defeat of the policy, as enunciated in *Wolf vs. Baldwin*, 19 Cal., and other cases, reserving public lands for actual, *bona fide* occupants. It will be seen at a glance how pointedly this reason applies to an attempt to gain constructive possession, and consequent practical ownership of large tracts, never yet surveyed, or even marked out, by simply writing deeds describing any desired quantity of land, by reference to sections, ranges and townships *to be surveyed*, when, and not till when, such constructive possession is to be proved in the courts. There is no limit whatever to the extent to which the public lands could thus be locked up and monopolized.

Then we say there is no possession made out here anterior to their patent title. Their title dates from the patent, as it did in the *Osgood* case.

D.

The case of the plaintiffs fails even on the application of the modern common law doctrine of riparian rights, because as a matter of fact and as found by the Court, there was here no watercourse.

We have referred elsewhere to the testimony tending to sustain the finding upon this point, and as to the law we cite the following authorities :

The proposition whether this was a water-course extending through plaintiff's lands, and whether they were riparian proprietors upon that water-course, is a question of fact to be decided by the jury or the court; and upon the application of settled principles to the testimony in this case, that question of fact was correctly decided.

In the case of *Eulrich vs. Richter*, 37 Wis. 228, the Court say:

"We think the learned Circuit Court erred in charging, as a proposition of law, that the *locus in quo* was a natural water-course." (It seems that in this case the Court below told the jury that it was a water-course, without referring it to the jury as a question of fact.) "The jury were told that there was no substantial conflict in the testimony with regard to the character of the streams, and that as a matter of law it was a water-course which the defendant had obstructed. The definition of a water-course, as given by Mr. Angell, and which has been substantially adapted by this Court, is a stream of water consisting of a bed, banks and water, though the water need not flow continually, and there are many water-courses which are sometimes dry. There is, however, a distinction in law between a regular flowing stream of water, which, at certain seasons, is dried up, and those occasional bursts of water which, in times of freshet, or the melting of snow and ice, descend from the hills and inundate the country. To maintain the character of a water-course, it must appear that the water usually flows in a certain direction, and by a regular channel, with banks or sides. It need not be shown that the water flows continually; the stream may at times be dry, but it must have a well-defined and substantial existence. (*Angell on Water Courses*, § 4, and other cases.) According to our understanding of the testimony, there is considerable doubt whether it proves a water-course, within this definition, or whether it did not appear that the water was mere surface water, descending from higher to lower ground in no defined channel in times of rain, or the melting of snow and ice in the spring. If it was mere surface water caused by rain or snow, which naturally flowed down the hollow or ravine, but in no defined channel, having a bed and banks, then it was not a water-course, and the defendant had the right to use such means as she might deem necessary to keep it off her land.

“ * * There was testimony which tended to show that
 “ the flow of water down the hollow or ravine from the
 “ plaintiff’s to the defendant’s land was not in any reg-
 “ ular channel, that it was only occasional, and did
 “ not prevent the cultivation of the ravine, or the
 “ growing of grass there. The plaintiff’s land was
 “ rolling, and considerably higher than the defendant’s
 “ and of course all surface water caused by rains or the
 “ melting of snow was discharged from the higher
 “ through the lower ground. But there was testimony
 “ from which the jury might have found that the flow
 “ of water did not constitute a water-course within the
 “ sense of the law; that it had no well-defined channel,
 “ with bed and banks, *which extended from the land of*
 “ *the plaintiff upon and across the land of the defendant.*”

See *Bowlsby vs. Spier*, 2 Vroom. (N. J.) 352.

See also *Sweat vs. Cutts*, 50 N. H., 439: The Court
 say: “ *This doctrine appears to embrace that large class of*
 “ *cases where the water flows in sight upon the surface in*
 “ *wet seasons of the year, but not to such an extent as to*
 “ *mark a regular channel with banks and sides; and also*
 “ *where the water moves slowly but obviously through boggy*
 “ *or swampy lands, constituting the sources of streams*
 “ *and rivers.*”

See also—

Goodall vs. Tuttle, 20 N. Y., 461.

Buffano vs. Harris, 5 R. I., 253.

Broadbent vs. Ramsbottom, 11 Exch., 602.

Shields vs. Arnott, 3 Gr. Ch., 246.

Dixon vs. The City, 7 Allen, 21.

Wagner vs. Long Island, 5 Thompson & Co. N.
 Y., 163.

S. C. 2 Hun., 635.

Conhocton vs. Buffalo, 5 Thomp. & Co. N. Y., 651.

S. C. 3 Hun., 523.

Delhi vs. Youmans, 45 N. Y., 363.

Curtis vs. Ayrault, 47 N. Y., 77.

To constitute a water-course, it must be in character
 permanent and constant in usual and ordinary seasons.
 But if a marsh or swamp is made by water oozing from
 the surrounding hills, generally wholly absorbed by
 the marsh, and only flowing from the basin or marsh
 in times of excessive rains or of melting snows, the
 party owning the marsh may divert.

Boynton vs. Gilman, 53 Vt., 19.

Again: The finding and evidence show that Buena Vista and Kern Lakes constituted the terminus of the water-course; that in its natural flow the water would first all go into the lake and only that reach the swamp which in unusual times overflowed the borders or rim of the lake. We submit that to such a case the doctrine of the common law can have no application. So far as standing water, that has no current, standing on the land is concerned; it belongs to the owner of the land, and he can divert it in the same manner as he can divert any other surface water.

State vs. Pattermeyer, 33 Ind., 402.

Cummings vs. Bassett, 10 Cush., 189.

Stevens vs. Patterson, 34 N. J. Law, 543.

Gould vs. Hudson, 6 N. Y., 522.

Thomlin vs. Dubuque, 32 Iowa, 106.

State vs. Milk, 13 Reporter, 709.

We had the right either to raise the outlet of the lake or to divert the water before it got into the lake, because when diverted it would be flowing in no regularly defined current and channel.

We had as much right to divert the water of Buena Vista and Kern Lakes before overflowing as we would have to cut ice from the lake, and for the same reasons.

Washington Ice Co. vs. Shortall, 13 Reporter, 9, and cases cited.

A mere remote contingent possibility, or even probability, that the water standing still, without current, in the lake might at some time trickle over and flow into the swamp, does not give to the proprietors in the swamp the common law riparian right. That is not the direct natural connection which is required by the common law to connect the dominant with the servient tenement, to maintain the claim for a diversion, at the suit of a riparian owner. That law intends the usual flow, the full flow, the uninterrupted flow, and the necessary flow; not a contingent, possible flow.

It is only upon the proposition that plaintiffs connect a running stream from their land to the point of the alleged diversion that they can have any right as a riparian proprietor. And here the standing and pooling of the water in the lakes breaks that connection.

In regard to the surplus waters which only come down in times of snow and overflow of the lake, the language of Judge Shaw, in *Cummings vs. C.*, 10 Cush., is applicable; and, besides, such a claim is too remote.

See *Elliott vs. Pittsburg*, 10 Cush., 195.

Another reason why the doctrine of riparian right is not applicable, whether the plaintiffs claim by virtue of their patents, or of the prior possession, or of their certificates of purchase, even conceding the existence of a water-course, grows out of a situation of the land and the water in the swamp, even upon their own showing.

By a glance at the map the Court will see, especially so far as the land embraced in the certificates of purchase is concerned, and clearly in regard to the other evidences of title also, the lands claimed by the plaintiff do not lie in any connected body entitling them to claim their asserted water-course upon the common law doctrine of extending *ad medium filum*.

The land for which the certificates of purchase were issued to plaintiffs are platted and granted without any reference to the course of the stream. And the manner in which the stream meanders through the several parcels, and the situation of these parcels with reference to the stream, exclude the application of the doctrine of riparian rights. On this point the case of *Hoehl vs. The City*, 57 Iowa, 454, is in point. The Court there say:

"The stream in question meanders through the city
 "fo Mosqueton; * * it is not made the general bound-
 "dary of property situated upon its sides, but the town
 "plat is laid out without any reference to it. In some
 "places lots extend far into the stream; in others they
 "are situated almost wholly within it; and in other
 "places the bed of the stream occupies almost the
 "entire width of a street. It is evident that no lot
 "owner bordering upon the edge of the stream could
 "have a qualified property in the soil to the thread of
 "the stream; for each lot would always be bounded
 "by another lot or by the edge of the street. It
 "seems that the doctrine of riparian proprietorship can-
 "not be applicable to property thus situated."

To the same effect is the language of the Court in the case of *The State vs. Milk.*, *supra*:

"Non-navigable streams are usually narrow; and the
 "lines of riparian proprietors can be extended into
 "them at right angles without interference or confu-
 "sion, and without serious injury to any one. It was
 "therefore natural, when such streams were called for
 "as boundaries, to hold that the real line between op-
 "posite shore owners was the thread of the current;

" * * but when this rule is attempted to be applied
 " to lakes or ponds, practical difficulties are encoun-
 " tered. *They have no current.* I do not think the
 " mere proprietorship of the surrounding lands will in
 " all cases give ownership to the beds of natural, non-
 " navigable lakes and ponds, regardless of their size."

E.

The claim of the plaintiffs is that, although they have sustained no injury, and could prove none, and although they have dismissed their claim for damages, yet, upon the assumption that defendants are mere trespassers, and not riparian proprietors, it was not necessary for them to prove any actual damage, and we are not entitled to take even a reasonable quantity of the water of the stream.

But we contend that in this case we stand in the attitude of supra-riparian proprietors, and had, in any event, the right to divert and use a reasonable quantity of water.

" The reasonableness of the use depends upon the
 " nature and size of the stream, the business or pur-
 " pose to which it is made subservient, and on the
 " ever-varying circumstances of each particular case.
 " Each case must therefore stand upon its own facts,
 " and can be a guide in other cases only as it may
 " illustrate the application of general principles. It
 " has been well said that in determining upon the
 " reasonableness of the use, it is necessary to take
 " into account not only the general customs of the
 " country, *but also any local customs along the streams,*
 " and that such general rule should be laid down as
 " appears best calculated to secure the entire water of
 " the stream to useful purposes."

Cooley on Torts., pp. 483-484, and cases cited.

" What constitutes a reasonable use is not a question
 " of law, but of fact. * * * Regard must be had
 " to the subject matter of the use; the occasion and
 " manner of its application; the object, *extent, necessity,*

“and duration of the use; the nature and size of the stream; the kind of business to which it is subservient; *the importance and necessity of the use claimed by one party, and the extent of the injury to the other party,* * * * and all the other and ever-varying circumstances of each particular case.”

Red River vs. Wright, Northwestern Reporter, March 24, 1883, Vol. 15, p. 169.

There must also be considered “the uses to which it can be or is applied. * * * *the rule is flexible and suited to the growing and changing wants of communities.*”

Harris vs. Baldwin, 44 N. H., 584.

City vs. Harris, 4 Allen, 495.

In this State the right to use water for irrigation stands on the same high plane that in England and some other States the right for domestic purposes stands, and the more recent cases affirm that “a riparian owner has the right to use water for such purposes, *even if that use consumes all the water during the dry season, when the water is very low.*”

Slack vs. Marsh, 11 Phila. R., 543.

“To limit a land-owner to the mere benefit of having a stream flow through his land, without any right to divert the same or any part of it, would be defeating, in a great measure, the purposes for which Providence had supplied these sources of comfort and convenience to man, and the means of fertilizing the soil and giving a profitable employment for industry and art; it is accordingly held, that if, in any question of diversion, the jury should find it was only of such water as the complaining party could not have used for any beneficial purpose, or that it was made in a reasonable manner, and for a proper purpose, an action for the same would not lie.

Washburn on Easements, § 230.

See also:

Gould vs. Boston, 13 Gray, 442.

Haskins vs. Haskins, 9 Gray, 390.

Tourtellot vs. Phelps, 4 Gray, 370-6.

Thurber vs. Martin, 2 Gray, 394.

Pitts vs. Lancaster Mills, 13 Mete., 156.

Wadsworth vs. Tillotson, 15 Conn., 366.

Springfield vs. Harris, 4 Allen, 494.

Snow vs. Parsons, 29 Ct., 462.

That we are riparian proprietors is evident from the fact that if there was any water-course from Buena Vista Lake to Tulare Lake, the banks and boundaries of that water-course were the boundaries of the whole swamp. And from this two things follow, first: that all riparian rights in the waters of this stream, from the Rio Bravo Ranch in the Sierra Nevada Mountains down to Tulare Lake, were in the Government of the United States as the owner of this whole bank of the water-course, and in its grantees acting under this license in diverting and appropriating the water; and, further, that even conceding all that is claimed by the plaintiffs, and even admitting their title to date from their certificates of purchase, they would not be riparian proprietors, because it is well settled law that "the mere ownership of the soil over which water flows gives no special or beneficial interest in the water. It is rather the ownership of the banks on either side of the stream that creates and upholds the right."

Woods on Nuisances, p. 316, § 345.

The fact that under the license and legislation of Congress we were taking water from the stream, and had possession of its bed and banks for that purpose, constituted us riparian proprietors.

Earl of Sandwich vs. Great Northern, Law Reports, 10 Chan., Div. 707.

In *Hill vs. King*, 8 Cal., 338, it is said: "Some of the later English authorities held that a right to water might be acquired by the riparian proprietor by appropriation; and this Court might with propriety have maintained the rights of water companies on the ground that they were riparian owners."

See also:

Elliott vs. Pittsburg, 10 Cushing, 195.

Mayor vs. The Commissioners, 7 Barr. Pa., 348.

Even if the plaintiffs could maintain their claim as riparian proprietors on the small depression which they claim to exist through the swamp, and call the slough, their rights as such would be bounded by the limits of each segregated parcel or section purchased by them from the State. If, by afterwards purchasing other lands in separate and segregated divisions from the State, they can extend their riparian rights over the whole tract, *a fortiori*, we, as grantees of the Government,

would be considered riparian proprietors above as to all the Government lands which we were authorized by the laws of Congress to irrigate.

F.

Plaintiffs have been guilty of such laches as disentitles them to any relief in Equity.

The testimony shows that in the year 1875, at the first inception of the Calloway, the plaintiffs knew how much water it was going to take.

Mr. Crocker testified that he talked with Mr. Miller and Mr. Lux about it; discussed with them the matter of the Calloway appropriation. Says he:

"I saw the Calloway last Fall. I have heard of it for several years; do not recollect when I first heard of it; it must have been three, or four, or five years ago; I presume I heard of it about the time it was commenced. I knew Mr. Calloway by sight; I heard people say he had commenced a canal over there; I never talked with him about it." (Trans. II, fols. 661-2).

Q. "Didn't you make any objections and tell him that he must not take the water out?"

A. "I don't know that I ever had anything to say about it—in one way or the other."

Q. "You don't recollect that you did tell Mr. Calloway that he must not build the Calloway Canal?"

A. "I don't know that I ever spoke to him about that; I never spoke to Mr. Calloway that I recollect of." (Fol. 662).

Q. "Did you ever talk to Miller and Lux about the Calloway Canal?"

A. "I think I have spoken with them upon that subject."

Q. "When?"

A. "Three or four years ago, when it was first talked of; to the best of my recollection, the first time I heard it talked of. I spoke with them about the fact that the canal was being started there." (Fol. 664).

[Maude says that the Calloway appropriation was the street talk at the time—the Spring of 1875. (T. III, fol. 1635.)]

Q. (To Crocker.)—"Did you hear about the dimensions that it had?"

A. "I presume I have heard it."

Q. "Did you talk to Miller & Lux about that?"

A. "I presume I did at the time, about the fact of taking out a large canal."

Q. "You had heard what the canal was taking out water for, hadn't you?"

A. "I presume; it was the general talk. (Fol. 666). I saw the canal for the first time last Fall. I did not go there before that, though I knew by hearsay where it was."

Q. "Did you go to the Records to see the record notice of it?"

A. "No sir." (Fol. 665).

Q. "Didn't you know it was the custom for those who take water out, to record a notice?"

A. "In some cases it is; in others it is not recorded." (Fol. 668).

Q. "You never heard that there was such a book of records?"

A. "I have heard that there was."

Q. "You knew that there was a book of records kept in which notices were recorded?"

A. "I looked over one book of records myself; the old Book of Records."

Q. "Where did you look at it?"

A. "In this town; a good many years ago, eight or nine years ago." (Fols. 669-670.)

Plaintiff's acquiescence also is shown by the testimony in the case. Wible requested the defendant to take the water away from them to prevent it doing them damage. Now, Wible was the Superintendent of the Kern Valley Water Company's Canal. (*Vide ante*, first part, pages 80 and 84.) This canal was constructed for the purpose of reclaiming the swamp lands. (*Ante*, page 80.) It was first started under the auspices of Mr. Livermore; afterwards it was turned over to the Kern Valley Water Company. (*Ante*, pages 78 and 80.) Crocker, on behalf of himself and Miller and Lux, was present at the inauguration of the work (Trans. II., fols. 621); "purchased supplies for the building of it, and paid part of the expense of building it." (Fol. 618). After the Kern Valley Water Company took charge of it, he "considered himself a stockholder in that corporation; his partners in the

concern told him that the land in suit belonged to that corporation." (Fols. 626-627). And on the oral argument of this case, your Honors will remember, Mr. McAllister contended that these plaintiffs had constructed this canal for the purpose of controlling the water in the swamp. We do not admit that the evidence supports his contention. We mention it, however, as showing that these plaintiffs, through their counsel, seek to identify themselves with the corporation, the Kern Valley Water Company. Wible, then, thus intimately connected with plaintiffs according to their own contention, went to the defendant and urged it to intercept the water and prevent it reaching plaintiff's lands. Wible is asked:

Q. "Do you recollect, sometime in 1878, going to Mr. Carr, or some of the agents of these ditches, and requesting him, or them to open the ditches to let more water in, so as to save your canal?"

A. "I recollect something that was said about that." (Trans. II, fol. 2099).

Mr. Carr is asked:

Q. "Do you recollect having any conversation with Mr. Wible in 1878, in connection with the water going down towards his camp, or being turned off by you, or any one else?"

A. "Yes, sir." (Trans. IV, fols. 1656-7). Mr. Wible asked me if I had not had some talk with Mr. Livermore at San Francisco? (Mr. Livermore was then Secretary of the Kern Valley Water Company *Vide*, Trans. II, fol. 2089). "I told him that Mr. Livermore had called on Mr. Haggin, and that he wanted us to turn the water in all of our canals, and especially to see what could be done by turning the water into Goose Lake; and that Mr. Livermore had offered us five hundred dollars to put on some teams and open up the canal and turn in water into Goose Lake; and I told him I didn't think it could be done for that money—the amount of water that he wanted to turn through. Mr. Wible then discussed the proposition of turning the water through just above Goose Lake, and I claimed, I believe that it would cost about a thousand dollars, and Mr. Wible thought it could be done for five hundred. My recollection was that he said he had, or would, put on some men himself; that something must be done or their canal would be torn to pieces there; that is, the canal at his headquarters; and he asked me, if I was willing, *to turn what water I could into the*

"Calloway and through the ditches; and I told him
 "I would, and I gave that order." That was in Feb-
 "ruary, 1878." (Trans. IV, fols. 1658—1660).

Your Honors will also bear in mind that plaintiffs are constantly urging, not only that the Calloway Canal is owned and controlled by Messrs. Haggin & Carr, but that many of the other canals on the river—especially the Goose Lake—are likewise owned by them.

Now, notwithstanding these plaintiffs knew all about the Calloway Canal from its very inception; discussed it amongst themselves; knew of its construction, its size and dimensions—the common talk of the place—acquiesced therein, and in its diversion of water; still they waited four years, with all this knowledge and acquiescence, before bringing their action. During this time vast sums of money were expended on the construction of the canal, and many third persons became interested by settling along its line.

We have, then, the case of plaintiffs, without bringing any action at law, without pretending to have suffered any actual damage, standing by for nearly the period of the Statute of Limitations while a great work like this—a work of such magnitude that it was the common talk of the place—was being prosecuted, large sums of money expended, and important rights becoming ~~invested~~ not only without opposition or complaint, but, so far as they acted, acquiescing affirmatively in the operation.

The whole testimony shows, that to sustain the claim of plaintiffs is to bring ruin upon whole communities; that to deny their claims is to inflict no appreciable damage upon them. It is, if ever there was, a case of bare technical right sought to be enforced by the remedial agency of a Court of Equity.

We submit, that here are all the reasons which have been adverted to in all the cases where, under such circumstances of laches, parties have been left to enforce their rights at law, and denied relief in equity.

This doctrine of laches is one inherent in Courts of Equity, and depends not at all upon the existence or operation of statutes of limitation. Another maxim is "*vigilantibus non dormientibus equitas subvenit*, the meaning of which is sufficiently obvious. It is designed to provoke diligence, to punish laches, and to discourage the assertion of stale claims. By virtue of this maxim such claims are rejected in equity independently of any statute of limitations."

Bispham, Sec. 39.

“ Although a Court of Chancery may have jurisdiction to prevent irreparable trespass, yet if the case presents questions of ownership, possession, dedication, etc., the parties will be remitted without prejudice to a Court of law.”

Hacker vs. Borden, 84 Ill., 313.

Bill to abate a nuisance.

Held: That delay for a year after knowledge to apply for relief against works which even then completely obstructed the street, standing alone, disentitled complainants to the relief sought.

“ The complainants have waited until at least a year after the whole work was completed before coming into Court for relief. Their property is in an unimproved part of the city. * * * They complain merely of the loss by means of the obstruction of a source of value to their property.”

Meredith vs. Sayre, 32 N. J. Eq., 565.

Bill for injunction against diversion of water.

“ *Held*: Bad; there being no averment of insolvency, or that the damages were not adequate compensation.”

C. & O. R. R. Co. vs. Bobbett, 5 W. Va., 138.

“ This remedy must be applied with the utmost caution—not applied if the injury be doubtful, eventful or contingent.”

Huff vs. Doyleston, 4 Brewster, Penn., 333.

In *Varney vs. Pope*, a delay of three years after the diversion was held to disentitle the party to relief in equity.

Varney vs. Pope, 60 Me., 195.

Agacom Co. Case, 36 Conn., 498.

Pascoe vs. Gross, 7 Phila., Pa., 317.

See:

Heermann vs. Beef Slough; *supra*.

In *Nevada Co., etc. vs. Kidd*, the Court say: “ The second count presents no grounds for injunction or equitable relief. It seeks only to restrain the commission of naked trespasses, with nothing in the nature of waste. There is no averment that the plaintiff ever, in fact, diverted the waters of Yuba River, or actually applied them to any use whatever; or that

“it ever was, or that it is yet, in a condition to divert
 “or use the water; or that it could now in any way use
 “it until plaintiff constructs a dam and canal, which
 “are now only in process of construction. Of course,
 “till the plaintiff can use the water itself, it can be no
 “injury for others to use it. The Court will not re-
 “strain the mere diversion of the water by others till
 “the plaintiff can make some possible use of it. It
 “does not appear that there is any injury for which a
 “recovery at law would not be a full, speedy and ade-
 “quate remedy.”

Nevada Co., etc. vs. Kidd, 37 Cal., 307.

In *Creighton vs. Evans*, 53 Cal., 56, this Court de-
 cided that an action at law would lie without proof of
 actual damage. A reference to the transcript will
 show that the Court was especially requested to award
 equitable relief, and they would not do so, but referred
 the plaintiff to his remedy at law.

So in *Basey vs. Gallagher*, 20 Wallace, 679, the Court
 say: “There is nothing in the statutes or decisions of
 “California abolishing this rule; and that upon this
 “distinction between law and equity still preserved
 “depends the substantial constitutional right of trial
 “by jury.”

In *Atchison vs. Peters*, Id., 515, they say: “But
 “whether, upon a petition or bill asserting that his
 “prior rights have been thus invaded, a Court of
 “equity will interfere to restrain the acts of the party
 “complained of, will depend upon the character and
 “extent of the injury alleged; whether it be irremedia-
 “ble in its nature; whether an action at law would
 “afford adequate remedy; whether the parties are able
 “to respond for the damages resulting from the injury,
 “and other considerations which ordinarily govern a
 “Court of Equity in the exercise of its preventive pro-
 “cess of injunction.”

See also *Cummings vs. Barrett*, 10 Cushing, 190.

In *Stragne vs. Steer*, 1 R. I., 251, where equity re-
 fused to interfere on the ground of two and a half or
 three years' laches, the Court cite the following case:
 “A diverted a water-course, which put 'B' to great ex-
 “pense in laying sooths, etc., and the diversion being
 “a great nuisance to 'B,' he brought his action” [at
 law], “but an injunction” [against the action] “was

“decreed upon a bill exhibited for that purpose, it being proved that plaintiff did see the work when it was carrying on, and connived at it, without showing the least disagreement, but rather the contrary. It is a principle of equity, that where a person has stood by, seeing an act done, and has consented to it, he cannot complain of that which he has himself expressly or impliedly authorized or permitted.”

The Court, in the exercise of its discretion in regard to the granting of an injunction, will, as we have seen, be influenced by any laches or delay which may have taken place in the institution of the proceedings.

Bridson vs. Benecke, 12 Bevan, 1.

Bovill vs. Crate, Law Reports, 1 Eq., 388.

“Long delay may amount to absolute acquiescence in the act complained of, and may, if unexplained, certainly throw considerable doubt upon the reality of the alleged injury.”

3 De Gray & J., 230.

Weeks vs. Hunt, 1 Johns, 372.

A man who lies by while he sees another person expend his capital and bestow his labor upon any work which he claims to have the right to prevent, without giving that person any notification, and who thus acquiesces in proceedings inconsistent with his own claim, shall in vain ask for an injunction, the effect of which will be to render all of the expense useless which he voluntarily suffered to be incurred.

Parrott vs. Palmer, 3 Myl. & Keene, 640.

Birmingham vs. Lloyd, 18 Vesey, 515.

vs. Bassett, 32 Law Journal, Ch. 286.

Maxwell vs. Hogg, Law Rep., 2 Ch., Ap. 319.

Harnett vs. Yielding, 2 Sch. & Le Froy, 552.

Delavan vs. Duncan, 49 N. Y., 488.

Finch vs. Parker, 49 N. Y., 1.

Green vs. Covilland, 10 Cal., 317.

Bensley vs. Mountain Lake, 13 Cal., 316.

Addison on Torts, p. 1,232; *id.*, p. 1,279.

In *Bassett vs. The Company*, the Court say:

“From this statement of the evidence it is manifest that the injury is not of the character that would call for the interference of a Court of Equity when the plaintiffs’ title had not been established at law; such is clearly the doctrine of *Coe vs. Lake Co.*, 37 N. H.

"255; *Wason vs. Sanborn*, 45 N. H., 169; *Eastman vs.*
 "*Amoskeag Man. Co.*, 47 N. H., 71; and the question
 "is, whether a judgment in a suit at law establishing
 "that title would justify an injunction under the cir-
 "cumstances of this case. This involves an inquiry
 "into the general principles which guide the discretion
 "of Courts of Equity upon applications of this sort.
 "The power to grant injunctions to prevent injustice
 "has always been regarded as peculiar and extraordi-
 "nary. It is not controlled by arbitrary and technical
 "rules, but the application for its exercise is addressed
 "to the conscience and sound discretion of the Court.
 "Ordinarily, it will not be exercised when the right of
 "the complainant is doubtful and has not been settled
 "at law; and even when it has been so settled an in-
 "junction will not be granted when the remedy at law
 "is adequate. It is not enough that an injury merely
 "nominal or theoretical is apprehended, even although
 "an action at law might be maintained for it, but to
 "justify the interposition of this summary power, there
 "must be cause to fear substantial and serious damage
 "for which Courts of law could furnish no adequate
 "remedy. What injuries shall be regarded as irrepar-
 "able at law must depend upon the circumstances of
 "the particular case. If the injury be trivial, as by
 "slightly darkening a neighbor's windows, or raising
 "the water of a river a few inches upon his rocky shore,
 "doing him no appreciable or serious damage, equity
 "would not ordinarily interfere by injunction; even in
 "cases where the right had been established at law,
 "for the power is extraordinary in its character, and is
 "to be exercised in general only in cases of necessity,
 "and when the Court cannot see that the other reme-
 "dies are inadequate to do justice between the parties,
 "and even then it is to be exercised with great care
 "and discretion.

"If the granting of an injunction would necessarily
 "cause great loss to the defendant, a loss altogether
 "disproportioned to the injury sustained by the plaint-
 "iff, that fact should be considered in determining
 "whether the application should be granted, and in
 "some cases it would justly have great weight.

"It has often been supposed that when the right has
 "been established at law the plaintiff would be entitled
 "to an injunction as a matter of course; and this mis-
 "apprehension has arisen probably from the fact that
 "in a large number of cases injunctions have been re-
 "fused upon the express ground that the title of the

“plaintiff had not been established at law, leaving
 “room for the inference that if it had been so estab-
 “lished the injunction would have been issued.

“This, however, is clearly not the doctrine of
 “Courts of Equity, for they will not ordinarily exercise
 “this summary and extraordinary power when substan-
 “tial justice can be done by courts of law.

“Such is the doctrine of our own Courts, as held in
 “the recent case of *Wason vs. Sanborn et al.*, 45 N. H.,
 “169, and *Eastman vs. Amoskeag Man. Co.*, 47 N. H.,
 “71; and so it is distinctly held in *Wood vs. Sutcliffe*
 “2 Simons, N. S., 163. In *Wason vs. Sanborn et al.*,
 “it was laid down by Bell, C. J., that to authorize the
 “Court’s interference by injunction there should ap-
 “pear imminent danger of great and irreparable dam-
 “age, and not of that for which an action at law would
 “furnish full indemnity. In *Eastman vs. Amoskeag*
 “*Man. Co.*, Nesmith J., says plaintiff shows a case of
 “strong and clear injustice of pressing necessities and
 “imminent danger of great and irreparable damage.

“In the *Attorney-General vs. Nichol*, 16 Ves., 337, it
 “was held that an injunction against darkening ancient
 “windows would not be granted in every case affecting
 “the value of a building, though an action at law might
 “lie. Lord Eldon says that the foundation of equity
 “jurisdiction to interfere by injunction, is that sort of
 “material injury to the comfort of those who dwell in
 “the neighboring house, requiring the application of a
 “power to prevent, as well as remedy, an evil; and
 “again, he says, he repeats the observation of Lord
 “Hardwicke, that the diminution of the value of the
 “premises is not a ground; and there is as little doubt
 “that this Court will not interpose upon every degree of
 “darkening ancient lights and windows. At the same
 “time he holds that an action on the case might
 “be maintained in many cases which would not sup-
 “port an injunction, and proof, therefore, that the
 “ancient lights were darkened without showing how
 “much, was not sufficient. This case, it will be seen,
 “was decided without regard to the fact whether the
 “title was or was not established at law.

“In 2 Story’s Eq. Jur., Sec. 925, it is said that it is
 “not every case that will furnish a right of action
 “against a party for a nuisance, that will justify the
 “interposition of Courts of Equity to redress the
 “injury, or to remove the nuisance; but there must be
 “such an injury as, from its nature, is not susceptible
 “of being adequately compensated by damage at law;

“or such as, from its continuance or permanent mis-
 “chief, must occasion a constantly recurring grievance,
 “which cannot be otherwise prevented by an injunction;
 “and he lays it down that a mere diminution of the value
 “of property by the nuisance, without irreparable mis-
 “chief, will not furnish any ground for equitable relief.
 “So is *Dunn vs. Valentine*, 5 Met., 8, where it was held
 “that the owner of a vacant house lot was not entitled
 “to an injunction to restrain the exercise of an offensive
 “trade near it, although it might diminish the value of
 “the lot, upon the ground that the remedy at law was
 “adequate.

“In *Begalow vs. Hartford Bridge Co.*, 14 Conn., 565, it
 “was held that to authorize an interference by injunction
 “there must be not only a violation of the plaintiff’s
 “rights, but such a violation as is, or will be, attended
 “with substantial and serious damage, and not merely a
 “technical or inconsequential injury, even although an
 “action at law might be maintained for it; and therefore
 “the Court refused to restrain the building of a cause-
 “way that would cause the water of Connecticut River
 “to rise more rapidly and higher on plaintiff’s land than
 “it otherwise would, it not appearing that it would ma-
 “terially affect the productions or injure the buildings.
 “See also *Attorney-General vs. Cleaver*, 18 Ves., 210, and
 “cases; *Hanson vs. Gardner*, 7 Ves., 305, and notes;
 “*Shreeve vs. Voorhees*, 2 Green Ch., 25; 2 U. S. Dig.,
 “374, Sec. 102; *Van Winkle vs. Curtis*, 2 Green, Ch.
 “422.

“To the point that the application is addressed to
 “the sound discretion of the Court, are *Riddall vs.*
 “*Bryan*, 14 Md., 444; 20 U. S. Dig., 530, Sec. 9; *Gray*
 “*vs. Ohio and Penn. Railroad*, 1 Grant’s Cases (Penn.),
 “412; 19 U. S. Dig., 380.

“Another principle which is held to govern the discre-
 “tion of the Court in these cases is that the application
 “for the injunction must be seasonably made, and
 “therefore if it appear that the owner of the property
 “supposed to be affected by a nuisance has allowed it
 “to exist for several years, with knowledge of its exist-
 “ence, and without any objection, and especially if he
 “has acquiesced in the claim of another to use and enjoy
 “the subject of complaint as of right, and to expend
 “money upon the strength of it, with his knowledge and
 “without objection, Courts of Equity will decline to
 “grant an injunction, but leave him to his remedy at
 “law. Nor would it be necessary that this acquiescence
 “should be such as to be a defense to a suit at law,

“although if a party stands by and sees another expend large sums of money in erecting what might in fact be a nuisance, and such party is aware that the other supposes he has a right to do what he is doing, and yet such party makes no objection, although aware of his rights, he would be estopped both at law and equity. So is *Odlin vs. Gove*, 41 N. H., 465.

“In the absence, however, of what would constitute an equitable estoppel, Courts will ordinarily decline to exercise this summary power, unless the party invoking it has used due diligence in making his application.

“In *The Rochdale Canal Co. vs. King*, 2 Simons. N. S., 78, this doctrine was fully recognized. There the defendant had taken from the plaintiff's canal water for making and condensing steam used by them to operate their mills upon the banks of the canal, when, by the law creating the canal corporation, the defendant had the right to take the water only for the purpose of condensing steam. It appeared that the defendant's mills were built in 1830, and water drawn from the canal for condensing steam, and also for generating it, and for other purposes, from that time down to 1847, with the plaintiff's knowledge and without objection until then, and that defendant incurred great expense in constructing his works, relying upon the water so obtained. In 1848 the plaintiffs brought an action at law against the defendant for using the water for other purposes than for condensing steam, and obtained a verdict for one shilling damages, upon which judgment was eventually rendered. This bill for an injunction was filed in February, 1851, and the Court decided that, after such acquiescence, the plaintiffs were not entitled to relief in equity, notwithstanding they had established their right at law. The decision went entirely upon the ground of the acquiescence of the plaintiffs, which deprived them of the right to the aid of a Court of Equity, whether it was a good defense at law or not.

“In *Wood vs. Sutcliffe*, 2 Simons, N. S., 163, an injunction was refused mainly upon the ground that the plaintiff stood by while defendant was constructing his works, and suffered him to use them from the beginning of 1845 until the beginning of 1850, without giving him any hint that he was doing what he had not a lawful right to do. The application was to restrain the defendant from pouring into the stream, on which both plaintiff and defendant had mills, the refuse from defendant's mill, the plaintiff having

" established his right in 1850 by a suit at law,
 " although the damages recovered were only nominal.
 " It appeared, also, that other mill owners discharged
 " their refuse into the same stream, and were paying
 " to the plaintiff for the privilege of doing so at the rate
 " of £2 per annum per horse-power, having made that
 " arrangement to avoid litigation. The Vice-Chancellor
 " was of the opinion that the injury might be compen-
 " sated in money, and that the injunction ought to be
 " refused on that ground, holding that as the plaintiff de-
 " sired to apply a certain pressure to bring the de-
 " fendant to terms, he ought to be left to the pressure
 " which may be applied by means of an action at law.

" In the case of the *Birmingham Canal Co. vs. Lloyd*,
 " 18 Ves., 515, where the danger apprehended was of a
 " very serious nature, the drawing off of the water of
 " the great reservoir of the canal, the injunction was
 " refused by Lord Eldon because the plaintiff had de-
 " layed coming to the Court till two years after notice
 " from the defendants that they proposed to work their
 " colliery, during which two years they had expended
 " £2,000 in providing engines, etc., for their works,
 " although the plaintiffs, on receiving the notice, had
 " notified the defendants that a suit at law would be
 " commenced if they proceeded to open the levels or
 " channels connected with the reservoir.

" So in *Ripon et al. vs. Hobart*, 3 Mylne & K., 169,
 " where an injunction was sought to restrain the de-
 " fendants from erecting a steam-engine for the pur-
 " pose of raising water from certain low lands which
 " they wished to drain, and throwing it into the river
 " Wetham, to the great injury, as the plaintiffs al-
 " leged, of the banks of that river, which plaintiffs
 " were bound to keep in repair to prevent the flooding
 " of the lands adjoining, it was held that due dili-
 " gence had not been used by the plaintiffs, they hav-
 " ing delayed application for the injunction for the
 " space of nine months after defendants had com-
 " menced and made considerable progress, and ex-
 " pended money therein. In both of these cases the
 " right of the plaintiffs had not been established at
 " law, but the injury apprehended in both cases was
 " of a very serious character, and irreparable in its
 " nature.

" *Barrett vs. Blagrove*, 6 Ves., 104, was an application
 " for an injunction to restrain the breach of a covenant,
 " but it was refused upon the ground that, after eleven
 " years' acquiescence, the plaintiffs must take their
 " chance at law.

“In *Binney's Case*, 2 Bland., Ch. 99 (Md.), it is held
 “that to authorize an injunction it must appear that the
 “applicant has acted promptly, and has not impliedly
 “authorized what he now objects to, by his laches or
 “acquiescence. If he applies to stay operations upon
 “a large and costly work, it should appear that he ap-
 “plied for an injunction as soon as he became apprised
 “of his rights and the extent of the threatened injury.
 “See abstract in 2 U. S. Equity, Dig. 65, Secs, 17, 18.

“So, standing by and seeing money expended in
 “erecting mills to be operated by a certain stream
 “without objection, is a waiver. *Jacox vs. Clark*, Walk.
 “Ch. 429 (Mich.); 2 U. S. Eq., Dig. 70, Sec. 137.

“So acquiescence may defeat the application for an
 “injunction, though not sufficient to defeat a suit at
 “law. *Gray vs. Ohio and Penn. Railroad*, 1 Grant's
 “Cases, 412; see also *Dunn vs. Sprevier*, 7 Ves., 235, and
 “notes.

“Upon these principles we are satisfied that an in-
 “junction ought not to be granted.

“In the first place, we think that the injury to these
 “three lots of land is not of such serious and irrepara-
 “ble character as to demand the interference of this
 “Court by way of an injunction, especially in view of
 “the serious loss and damage it would naturally cause
 “the defendants; arming, as it must necessarily do, the
 “plaintiff with the power of exacting from the defendants
 “large sums of money, limited, as it would seem, only
 “by his sense of what he could conscientiously ask as an
 “indemnity for the injury to all these lands, and the ex-
 “penses attending the long protracted litigation, includ-
 “ing the services bestowed by himself in the prosecution
 “of the several suits between them. Independent, how-
 “ever, of the effect upon the defendants, we think that,
 “in respect to the three lots, the plaintiff has an adequate
 “remedy at law. In the most serious aspect in which it
 “can be viewed, the injury to these lands is but trifling.
 “The prices paid for the whole five and a half acres was
 “\$207—about \$37.50 per acre—mostly selected from
 “larger pieces with a view to flowage. Of this quantity
 “a little more than a half an acre appears to be flowed
 “in two places, one-quarter of an acre each; in one
 “eleven and three-fourths rods, and another a piece of
 “a steep bank, how much does not appear. These
 “pieces are not shown to be productive, or that they
 “ever were; on the contrary, most of it appears to
 “be wet or swamp land; and it does not appear that
 “they are connected with other lands, so as to make it

“essential that the water should be withdrawn during
 “the summer months; and it will be observed that de-
 “fendants have the right to keep up the water from
 “October 12th to May 12th in each year.

“We cannot, under these circumstances, regard the
 “injury of such a serious character as to call for the
 “interference of this Court. On the contrary, we re-
 “gard it as nothing more than an ordinary case of a
 “diminution of the value of land, which can be ad-
 “equately compensated at law; and in this we are sus-
 “tained by the case of *Wason vs. Sanborn et al.*, and
 “*Eastman vs. Amoskeag Man. Co.*, before cited.

“Upon the ground of acquiescence, or laches, we
 “think the injunction ought not to be granted. For
 “seven or eight years the owners of these lands have
 “stood by and witnessed the flowing of them, without
 “objection; and, although it may not constitute a good
 “defense to a suit at law, it furnishes a decisive objec-
 “tion to the interposition of a Court of Equity. The
 “authorities already cited establish the general rule,
 “and there is nothing to take this case out of it. There
 “was clearly an acquiescence of seven or eight years
 “before any hint was given of any claim for compensa-
 “tion, and under circumstances, too, that called for
 “notice if any substantial injury was sustained, and
 “during this time the Salisbury Manufacturing Com-
 “pany expended large sums in extending their works.

“In several of the cases cited, an injunction was
 “refused when the acquiescence was for a much shorter
 “time; and we are satisfied that there is nothing here
 “to distinguish the case favorably for the plaintiff
 “from many of the cases cited.”

Bassett vs. Company, 47 N. H., 437, A. D. 1867.

That the finding of “laches” is abundantly sus-
 tained, *vide*.

Banks vs. Fairbanks, 49 N. H., 144.

Peabody vs. Flint, 6 Allen, 67.

Nasser vs. Seely, 10 Neb., 460, was a bill to enjoin
 the flowing of land by mill-dam. The defendant com-
 menced his building June 15, 1878, and finished March
 25, 1879, at an expense of about \$15,000. On or about
 the first day of August, 1878, defendant had expended
 \$4,000. From the time he commenced, June 15, 1878,
 till August 1, 1878, complainant well knew that the de-
 fendant was expending large sums in the mill and dam,
 and that if completed it would bulk the water in his

dam. Notwithstanding such knowledge he allowed the defendant to proceed without objection, and solicited employment in the construction of the work he now seeks to enjoin. *Held*, fatal laches.

See *Weber vs. Marshall*, 19 Cal., 458.

Corning vs. Troy, 40 N. Y., 205, was much relied upon by appellants below, but that case is clearly distinguishable from this. That action was for damages and to restrain the diversion of the water-course. Grover, J., in delivering the opinion of the Court, held that equity had jurisdiction, first, upon the ground that the remedy at law is inadequate, as legal remedies cannot restore the flow of the stream; and, second, to avoid multiplicity of actions. In answer to the points of laches, and that title had not been settled at law, he said:

"It is insisted that the equitable right of restoration has been lost by delay. The Statute of Limitation, either at law or in equity, has not attached so as to bar the right. The case has, therefore, no analogy to that class of cases where equity has refused relief upon the ground that the legal remedy was barred by the statute. *The defendant has expended no money upon improvements since the expiration of the lease*; consequently the principle of the cases holding that where, during the delay of a party in asserting his right, expenditures have been made in improvements equity will not interfere, do not apply. *Lewis vs. Chapman*, 3 Beavan, is one of this class. The plaintiff sought to restrain by injunction the publication of a work of which he was the owner of a copyright. It appeared that he had lain still for six years and upwards, and seen the defendant expending his money in printing the work, etc., etc.; upon this ground equity refused to relieve the plaintiff. There are numerous cases of this description found in the books, but they all rest upon the same principle."

He further states that formerly the universal rule was that equity would not interfere until a right had been settled at law; but claims that that rule no longer prevails in New York.

[See, however, *Lacustrine vs. L. G., etc.*, 82 N. Y., 485, that a relaxation of the rule in New York has only gone to the extent of holding that the establishing of a title at law is *not indispensably necessary*; but that in the discretion of the Court they can still insist upon the former universal rule; and the appellate Court will not interfere with such discretion.]

Woodruff, J., who, it seems, also delivered the opinion of the Court, in *Corning vs. Troy* said: "It therefore is not the case of a plaintiff lying by when his legal right is invaded, and permitting his adversary to expend large sums of money in valuable improvements, and then invoking the aid of a Court of Equity to enforce his legal right, at a great loss or sacrifice by the defendant, resulting from the plaintiff's delay; of which examples are stated in the opinion on the former argument. These improvements were voluntarily made during a time when there was neither right nor motive to object thereto."

There were eight Judges, and of these five concurred in the foregoing opinion; the other three holding that the plaintiff should be confined to his legal remedy in damages, and that the equitable relief by injunction should be denied on the ground of a great loss and injury to the work, and slight advantage to plaintiffs from a restoration, assent during the lease to expensive improvements, and delay in suing after the lease.

The opinion of Hopboom in the same case, as reported in 39 Barb., shows the same distinction between that case and this, and sustains our principle; and that if the expenditures of defendant in *Corning vs. Troy* had been made like those of defendants here, the contrary would have been held. But all turned on the fact that the expenditures were made while defendant had a lease with thirteen years yet to run, and therefore plaintiff had no right to object.

P. C. "It is because a party stands silently by and sees an injurious and unwarrantable act done to his property, and does not protest against it, *that he is regarded* as tacitly acquiescing in the propriety of such act, * * and shall not be permitted thereafter to question it when such a course would work damage to an innocent party." (39 Barb., 324).

In a late case, where an injunction as against a nuisance had been granted in favor of an *infra vs.* a *supra*-proprietor, the Court, after showing that such injunction would enable the lower proprietor to make a use of the stream from which the upper would at times be excluded, and without the burden of restraint, which to the other might at times be very serious, and would also enable the lower to annoy the other by insisting upon requirements which might benefit him much less than they would inconvenience his neighbor, say: "In the case of rights like those here in question that pro-

“cess (injunction) is not only troublesome, but susceptible of great abuses, from the extreme difficulty of laying down any precise rule that will fit the varying circumstances. Except in very clear cases, it is generally better to leave the parties to their legal remedy in the recovery of damages. Decree reversed and bill dismissed.”

Hoxsie vs. Hoxsie, 38 Mich., 77.

To the same effect, and that the remedy by injunction is not of right, but of grace; that it is discretionary with the Court below whether to grant or refuse an injunction in cases like this, where there is no proof of insolvency and the damage is trifling and capable of compensation in money, even though the act is a nuisance and technically a waste. The facts were that the plaintiff was the prior appropriator of public land and water, which he had devoted to beneficial uses—milk ranch, irrigation, fruit trees, etc.; and defendants subsequently locating above him, claimed the right as miners to foul the water and destroy his improvements.

Slade vs. Sullivan, 17 Cal., 107.

In *Parke vs. Kilham*, 8 Cal., 78, the following instruction was approved as law in this State:

“If those from and through whom the plaintiff’s claim had the prior right to the waters in the middle fork of Jackson Creek, and they stood by and saw those from whom defendant derives his title to the ditch, and the right to the waters of the said creek, appropriate the waters of the creek, at a great expenditure of money and labor, under the mistaken idea that the defendant’s vendors were obtaining the first appropriation, and did not inform them of the mistake, that they, plaintiff’s vendors, and the plaintiffs who claim under them, are estopped from setting up their prior right at this time.”

In *Edwards vs. Allouez Co.*, 38 Mich., 46, a bill by riparian infra proprietor to obtain a perpetual injunction against a nuisance committed by fouling the stream, and consequently absolutely destroying and covering with debris complainant’s land. The decree below, which was affirmed on appeal, denied all equitable relief on the ground that the remedy was at law. The Court say that the mining operations of defendant could not be carried on with profit without doing the

acts complained of; that the value of plaintiff's land to plaintiff was small, it not having been purchased for use or occupation, but as a matter of speculation, and apparently expecting to force defendant to purchase it; that the operations of defendant, whether they inflict any serious injury on complainant or not, amount in effect to an appropriation of that portion of his property upon which sand is being deposited. It follows, and is beyond question, that complainant sustains a legal injury for which he is entitled to suitable redress. The only question in this record is, whether he is entitled to the special redress he seeks, namely, an injunction. An injunction is not a process to be lightly ordered in any case. Where the effect will be to present to the owners of a valuable mill the alternative either to purchase complainant's lands at his own price, or to sacrifice their property, any Court having the power to order it ought very carefully to scrutinize the case, and make sure that equity requires it. In theory its purpose is to prevent irreparable mischief; it stays an evil, the consequences of which could not adequately be compensated if it were suffered to go on." (Citing cases.)

"The writ 'is not' *ex debito justitiae* for any injury threatened or done to the estate or rights of a person, but the granting of it must always rest in sound discretion, governed by the nature of the case. *Enfield Toll Bridge Co. vs. Connecticut River Co.*, 7 Conn., 50. As is said in another case: 'Injunction is not of right but of grace; and to move an upright Chancellor to interpose this strongest arm of the law, he must have not a sham case, but a well-grounded complaint, the *bona fides* of which is unquestioned, or capable of vindication if questioned.' *Kenton vs. Railway Co.*, 54 Penn. St., 454. 'There is no power,' says Mr. Justice Baldwin, 'the exercise of which is more delicate, which requires greater caution, deliberation and sound discretion, or is more dangerous in a doubtful case than the issuing of an injunction. It is the strong arm of equity, that never ought to be extended unless to cases of great injury, where courts of law cannot afford an adequate or commensurate remedy in damages.' *Bonaparte vs. Camden, etc., R. R. Co.*, Bald., 218. All the cases referred to show that the Court looks beyond the actual injury to contemplate the consequences, and however palpable may be the wrong, it will still balance the inconveniences of awarding or denying the writ, and adjudge as these may incline the

“judicial mind. *Gray vs. Ohio, etc., R. R. Co.* 1 Grant, 412; *Varney vs. Pope* 60 Maine, 192; *Bosley vs. M'Kim*, 7 Har. & J., 468. Even in the case of the palpable violation of a public right to the annoyance of one individual, he must show the equity which requires this summary interference as the only adequate means of obtaining justice. *Sparhawk vs. Union Passenger Railway Co.* 54 Penn. St., 401. * * *

“The complainant is entitled to his rights under the rules of law, but * * * to nothing of grace. * * * Defendant is not alleged to be irresponsible, and a jury, it is supposed, will award all that is reasonable. If complainant wants more than is reasonable, he has a right to obtain it under the rules of law, but he cannot demand the aid of equity in a speculation. * * * The elements of irreparable injury are entirely wanting to his case. Our conclusion is that the Circuit Court gave the complainant all he was entitled to when the case was sent to a jury. The decree must, therefore, be affirmed with costs.”

This statement by Judge Cooley is pertinent here, and was carefully made after full argument, in which the authorities relied on by appellant, such as *Corning vs. Troy*, were cited. It shows that the true principle is the one always inherent in equity jurisdiction—the distinction between rigid law and flexible equity; between the remedy which is of right and that which is of grace—that the mere fact that the injury is to “realty,” that it consists in abstracting what cannot be replaced *in specio* does not necessarily make out a case of “irreparable injury;” nor does the fact that water is diverted or fouled necessarily call for the taking of jurisdiction by equity, upon the maxim of preventing a “multiplicity of actions.” Here this Michigan case accords with the California doctrine as held in *Slade vs. Sullivan*, 17 Cal., and elsewhere.

Bill for injunction to restrain construction of sewer on plaintiff's land. Pursuant to ordinance, approved April 22d, 1870, defendants took possession.

P. C.—“The defendants are engaged in the construction of an important public work, the speedy completion of which, it would seem, is indispensable to the proper protection of the public health. In such a case this Court must not put in force its prohibitory power unless it is the only means by which adequate redress can be given. To induce the Court to act there must be promptitude, an invasion of a

“clear right, and no other adequate remedy. It is undisputed that the complainants have permitted the public authorities to oust them, and to take possession of the land they now claim, and to expend in preparing it for use as a public street, a large amount of public funds; and that since it has been so prepared they have stood by quietly and permitted it to be constantly appropriated to the purposes of a public highway. Under these circumstances I take it to be too clear for argument that they have so far encouraged or sanctioned the action of the public authorities as to divest themselves of the right to demand that a *Court of Equity* shall now, by its introduction, deprive the public, even temporarily, of the benefit of its expenditures. (*M. and E. R. R. Co. vs. Prudden*, 5 C. E. Gr., 530; *Easton vs. N. Y.*, 9 C. E. Gr., 49.)

“This Court will even refuse to exert its prohibitory power in aid of rights asserted on behalf of the State when it appears that its representations by silence and inaction have *presumably* encouraged the outlay of large sums of money in the prosecution of an important public enterprise, undertaken in good faith, and which, if arrested, would bring disaster upon its projectors. *Attorney-General vs. Delaware, etc.*, 12 C. E. Gr., 1. The complainants by laches, if not by acquiescence, have lost all right to have the use of this street forbidden. By delay they have made it impossible for the Court to give them the special relief they ask for without doing great and irreparable injury to the public; *they have, therefore, no claim to such relief as it is the peculiar province of Courts of Equity to give, but must be left to pursue their ordinary legal remedy.* * * * Now when the public authorities have reached a point in the prosecution of the work, when retreat is impossible, this Court is asked to stretch forth its arm. The appeal comes too late; besides, there is reason to believe the complainant’s delay was designed. * * * On June 14, 1870, the complainants presented a remonstrance to the defendants against the proceedings already taken for the opening of this street. This did not relieve them from the consequences of their subsequent laches. (*Easton vs. N. Y.*, *supra*). Besides, the remonstrance did not deny a dedication, but simply disputed the regularity of the proceedings for opening.”

Traphagan vs. Mayor, etc., 29 N. J. Eq., 208.

An appeal was taken, but the decree was unanimously affirmed.

Ibid. 650.

Suit to restrain a nuisance. P. C.

“To grant their (complainants’) prayer is to destroy defendant’s business. Power attended with such disastrous consequences should always be exercised sparingly, and with the utmost caution. All doubts should be resolved against its exercise. *Att’y Gen’l. vs. Nichol*, 16 Ves., 338. Relief by injunction in such cases is not a matter of right, but rests in discretion. If the legal right is not clear, or the injury is doubtful, eventual or contingent, *equity* will give no aid. (Richard’s Ap., 57 Pa. St., 105; *Rhodes vs. Dunbar*, *id.* 274; *Huckenstine’s App.*, 70 Pa. St., 102). And so, too, the Court is bound to compare consequences. If the fact of an actionable nuisance is clearly established, then the Court is bound to consider whether a greater injury will not be done by granting an injunction, and thus destroying a citizen’s property, and taking away from him his means of livelihood, than will result from a refusal, *and leaving the injured party to his ordinary legal remedy*; and if, on thus contrasting consequences, it appears doubtful whether greater injury will not be done by granting than by withholding the injunction, it is the duty of the Court to decline to interfere. *Hilton vs. Earl*, 1 Cr. & Ph., 283. The duty of granting or refusing an injunction is a matter resting in sound discretion. It should never be granted where it will operate oppressively, *or contrary to the real justice of the case*, or when it is not the fit and appropriate method of redress under all the circumstances of the case, or when it will or may work fatal injury to the person enjoined. *Jones vs. City*, 3 Stockb., 452. Mr. Justice Depue, speaking for a majority of the Judges of the Court of Errors and Appeals, in *Morris and Essex vs. Pudden*, *supra*, said: ‘It must be a strong and mischievous case of pressing necessity, or the right must have been previously established at law, to entitle a party to an injunction; * * * and the writ ought not to be granted where the benefit secured by it to one party is of but little importance, while it will operate oppressively, and to the great annoyance and injury of the other, unless the wrong complained of is so wanton and unprovoked in its character as properly to deprive the wrongdoer of the benefit of any consideration as to its injurious character.’ * * * Perhaps the most accurate statement * * * is that given by Mr. Justice Mellor * * * in 1863. He said: ‘Every man is bound to use his own property in such

"manner as not to injure the property of his neighbor. * * * But the law does not regard trifling inconveniences; everything must be looked at from a reasonable point of view; and therefore in an action for nuisance to property * * * the injury, to be actionable, must be such as visibly to diminish the value of the property and the comfort and enjoyment of it. In determining whether a nuisance exists or not, the time, locality and all the circumstances should be taken into consideration. In countries where great works have been erected and carried on, which are the means of developing the sectional wealth, persons must not stand on extreme rights.' * * * This direction was approved first by the Court of Queen's Bench (*Tipping vs. St. Helen's*, 4 B. & S. 608), and afterwards by the Exchequer Chamber (4 B. & S., 616), and finally by the House of Lords (*St. Helen's vs. Tipping*, 11 H. of L. cases 642). This must be regarded as a final settlement of the law in England. The Court should always, in cases of this kind, consider the customs of the people, the nature and character of their employment, and the circumstances and surroundings of the business which is alleged to be a nuisance."

Demarest vs. Hardham, 34 N. J. Eq., 473.

Campbell vs. Seaman, 63 N. Y., 576, another of the cases relied on by appellants below, belongs to the class of cases, among which *Demarest vs. Hardham*, cited by us, is conspicuous for conclusive reasoning and exhaustive research. In so far as they differ, we confidently submit the reasoning of each. But *Campbell vs. Seaman* sustains us. The Court there say (p. 585): "It is true that if a party sleeps on his rights and allows a nuisance to go on without remonstrance or without taking measures, either by suit at law or in equity, to protect his rights, and allows one to go on making large expenditures about the business which constitutes the nuisance, he will sometimes be regarded as guilty of such laches as to deprive him of equitable relief." Again (p. 586): "Where the damage to one complaining of a nuisance is small or trifling, and the damage to one causing the nuisance will be large in case he is restrained, the courts will sometimes deny an injunction. But such is not this case; here the damage to the plaintiffs, as found by the referee, is large and substantial. It does not appear how much damage the defendant will suffer

"from the restraint of the injunction." They then go on to show that defendant's works are not expensive; that he will suffer little or no injury by being compelled to put his land to such uses as would not injure others; and that his damage from an abatement will not be as great as plaintiff's from a continuance of the nuisance, and concludes: "*Hence, this is not a case within any authority to which our attention has been called, where an injunction should be denied on account of the serious consequences to the defendant.*" Again (p. 584): "There was no acquiescence or laches which should bar the plaintiffs, *within any rule laid down in any reported case.*" (P. 582). True, they say that *now* injunction is "matter of grace in no sense except that it rests in the sound discretion of the Court, and that discretion is not an arbitrary one. * * * If improperly exercised, * * * to be corrected on appeal." To this many authorities are cited.

One is *Parker vs. Winnipiseogee Co.*, 2 Black (U. S.), 456. There, as here, a party claiming as riparian proprietor on a large stream issuing from a lake sued in Chancery. The bill was dismissed for want of jurisdiction, because the remedy was at law for damages. The defendants had deepened the outlet of the lake, and also constructed a stone dam, so that in wet times they could utilize and store what would otherwise have gone to waste, and in seasons of drouth could thus increase the flow, or diminish at other periods. The complainant planted himself on his alleged common-law riparian right to have the water flow undisturbed, etc. The defendants were not riparian proprietors any more or otherwise than defendants here are. The principles laid down by the Supreme Court of the United States are simply those for which we contend and those enunciated in the cases we have cited. P. C. "It was urged at the hearing, as an insuperable objection to the relief prayed for, that the appellant has not established his right by an action at law. The objection was not taken by demurrer, or in the answer. In the Courts of the United States it is regarded as jurisdictional, and may be enforced by the Court *sua sponte*, though not raised by the pleadings nor suggested by counsel. * * Where the remedy at law is of this character" (plain, adequate and complete—as practical and as efficient to the ends of justice and to its prompt administration as the remedy in equity) "the party seeking redress must pursue it. In such case the adverse party has a constitutional right to trial by jury. The concur-

“rent jurisdiction of Courts of Equity in cases of private nuisance * * is now too firmly established to be shaken, *but it is not without limitation. It is governed by the same principles which animate and control its action in other cases where its aid may be invoked against a wrongdoer.* * * *

“A diminution of the value of the premises without irreparable injury is no ground for interference. 2 Bro., C. C., 65; 16 Vesey, 342; 3 M. & K., 169. Where an injunction is granted without a trial at law it is usually upon the principle of preserving the property until a trial at law can be had. A strong *prima facie* case of right must be shown, and there must have been no *improper delay*. The Court will consider all the circumstances, and exercise a careful discretion. Cr. & Ph., 283. * * *

“*A delay of three years or more has been frequently held to be such laches as will preclude a party from relief in equity until he has vindicated his right at law.* 1 Cox, 102; 2 J. C. R., 379; 3 J. C. R., 282; 6 J. C. R., 19; 5 Met., 8.

“The better opinion now is, that it is only a fact to be considered by the Chancellor in connection with the other facts of the case by which his discretion is to be guided. *Woods vs. Sutcliffe*, 8 Eng. L. & E., 217; *Sprague vs. Rhodes*, 4 R. I., 304. * *

“The case must be one of strong and imperious necessity, or the right must have been previously established at law. * * After the right has been established at law, a Court of Chancery will not, *as of course*, interfere by injunction. It will consider all the circumstances, the consequences of such action, and the real equity of the case. 4 R. I., 301; 8 Eng. L. & E., 104; 18 Eng. Cond., Ch. R. 436. The excavation was made * * in 1846. The stone dam was erected in 1851. The appellant brought his bill on the 18th of September, 1855. * * If he has been injured, his injury can be ascertained and fully repaired by damages in an action at law. A jury is the tribunal provided by law to determine the facts and to fix the amount, and they can best perform this duty. * * The appellant can have no standing in a Court of Equity until he has laid this foundation for relief. This objection is fatal to the case. There are cases in which a Court of Equity will take jurisdiction, and give a complete remedy, without the previous intervention of a court of law. (Citing cases.) But this does not belong to that class.”

An English case cited in *Campbell vs. Seaman* only decided that there was a clear legal right and a substantial, not a technical damage.

It arose under a statute changing the rule, which we have not enacted and could not constitutionally enact, and it is said that without that statute the action would first have been sent to be tried by law.

Webber vs. Gage, 39 N. H., 182, is also cited in *Campbell vs. Seaman*, but we have cited later New Hampshire cases showing the doctrine in that State to be exactly as we claim it, and besides *Webber vs. Gage* is nothing but the California doctrine of *Chapman vs. Tuolumne*, 8 Cal., and what is more important, the opinion in *Webber vs. Gage* fits our case exactly, and draws the proper distinction between the cases, showing that if we had asked to enjoin plaintiffs from disturbing our right the case decided would have been presented.

Woods vs. Sutcliffe, 2 Simons (N. S.) 166, is also cited, and as the case is singularly in point, we will extract largely from it. It was a bill to enjoin the pollution of a water-course as being a nuisance. The plaintiffs had established the title by a verdict in an action at law brought in 1850. P. C.—“ * * I cannot assent to “proposition that on the mere dry fact of the plaintiffs “having the abstract right, a Court of Equity will, as a “matter of course. on that right being established at “law, grant an injunction, if the right be infringed ever “so minutely. On the other hand, I am far from saying that because in the action at law, the jury has “given only a shilling or a farthing damages, that is a “ground for concluding that the injury is not serious, “and that the case is one in which an injunction is not “to be granted. * * * No doubt there was “a time, and probably not a very remote one, when the “stream * * flowed through open fields, pure and unpolluted, to the plaintiffs’ mills. But whenever human “beings congregate in large numbers on the banks of a “stream, the inevitable consequence is that * * * “sewerage * * necessarily has the effect of polluting it. * * Not all the courts of law and equity “in the kingdom can prevent it; for they cannot remove the mass of human beings who are congregated “on the banks of the stream. * * On the other “hand, to grant the injunction would have the effect of “seriously injuring, if not ruining, the defendants. “Weighing, then, the injury that may accrue to the

“one party or the other by granting or refusing the injunction, I think, if my decision were to turn on this point alone, I should be bound to refuse it.” After stating that plaintiffs, by threat of suit, forced others who were polluting the stream to settle by paying a certain price per annum for the right of polluting the water:

“Now, if such an arrangement as that can be made, ought I to grant an injunction in order to compel the defendants to enter into it when the bringing of an action would be almost (I will not say quite) as efficacious? If the plaintiffs desire to apply to the defendants a certain pressure in order to bring them to terms, I think that I ought to leave plaintiffs to that pressure. * * If the plaintiffs brought an action, and the matter being represented to the jury, the jury were satisfied that the defendants ought to come to terms, they might give the plaintiffs £50 or £100 damages, instead of a farthing, etc. * * On the ground, therefore, that the plaintiffs themselves have shown that the injury they complain of is one which in some way may be compensated by money, I think I ought not to grant the injunction. But I do not rest my decision upon either of the grounds which I have mentioned. *The principal ground upon which I conceive that I must refuse this injunction is that the plaintiffs have not used due diligence in vindicating their rights. They stood by whilst the defendants were constructing their works, and they suffered the defendants to use their works after they were constructed, from the beginning of 1845 until the beginning of 1850, a period of very nearly five years, without giving them any hint that they were doing anything that they had not a lawful right to do; and if there had been nothing else in the case, I should have been of opinion, on this ground alone, that the plaintiffs were not entitled to the injunction. I incline to think, also, that the injunction ought to be refused on the ground that the injury complained of is capable of being compensated by money; and, in my opinion, it ought also to be refused on the ground that the granting of it would inflict serious damage upon the defendants, without doing any real, practical good to the plaintiffs.*”

Campbell vs. Seaman is altogether unlike this case in all essentials. It was not for diversion of water, but for a nuisance which was destroying valuable improvements and a house erected and improved at great expense, without any knowledge of the nuisance.

No injury resulted to defendant, who did not even own the land on which the nuisance was, and that land could be applied without loss and with equal profit to other uses. There was no expenditure of moment by defendant, and plaintiff had warned him in time and did sue him as soon as he found out the nature and extent of the injury.

"Where the jury find that the rebuilding of a proposed mill and dam would overflow and render useless the plaintiff's land and injure the health of his family, but that the mill would be a public convenience, pecuniary compensation is all the plaintiff can claim, and an injunction against such erection will be refused, upon the principle that private advantage must yield to public benefit (2 Dev. Eq., 38)."

Daugherty vs. Warren, Oct. Term, 1881. Sup. Ct., N. C.

Brown vs. Carolina Central, 83 N. C., 128.

In *Fuller vs. Inhabitants*, 1 Allen, 166, plaintiff asked to enjoin appropriation of town money. The petition was presented January 8, 1858. The vote of the town to do the work and to raise and appropriate the money to pay for it passed March 2, 1857. Before filing petition the work had substantially been done.

P. C.—"We think these facts are decisive against the claim of the petitioners for equitable relief, and that the case is clearly within the doctrine stated in *Tash vs. Adams*, 10 Cush., 252. It was said by the Court in that case that 'it is a well established rule in equity that if a party is guilty of *laches* or unreasonable delay in the enforcement of his rights, he thereby forfeits his claim to equitable relief;' and that this rule is *more especially* applicable to cases where a party, being cognizant of his rights, does not take those steps to enforce them which are open to him, but lies by and suffers other parties to incur expenses and enter into engagements and contracts of a burdensome character. * * * Here, then, was a delay of ten months, without reason or excuse, so far as appears, as has been suggested. Petition dismissed."

So in California.

Bill to enjoin waste in quartz mine:

P. C. "It appears that the defendants have been in possession of the quartz ledge in question for several

“months, have expended large sums of money in developing and working the same, and were at the time of granting the injunction and had for some time previously been working the mine as their own. In such case it requires a very clear and strong showing to induce a Court of Equity to grant or sustain an injunction to stop the work. There must be an urgent necessity, and, as a general rule, the title and right of the plaintiffs should be shown to be clear, well-established, and not in dispute. The application should also be made promptly, and not delayed until large expenditures have been made by the defendants,” citing many cases.

“When the title to the property is in dispute * * * the extent of inconvenience and expense to which the defendant would be subjected by the granting of the injunction, as compared with the injury the plaintiff would be likely to suffer if refused, often forms an important consideration in determining the right to an injunction. * * * The question whether the defendants are solvent, and able to respond in the damages, * * * is often an important one. * * * The plaintiffs have set up no circumstances of this kind to sustain their application for an injunction.”

Real Del Monte Co. vs. Pond Co., 23 Cal., 84.

“Five years held such laches and acquiescence as to defeat bill for injunction to remove building.”

Gaskin vs. Ball, L. R., 13 Ch., Div. 326.

Seven years delay held laches, and bar to equitable relief, property having appreciated in value.

P. C.—“Taking into consideration the inevitable publicity of most of the proceedings, the dates at which they occurred, and the ample means of knowledge, or at least the opportunities and inducements for inquiry which the plaintiff had, we find it impossible to avoid the conclusion that there has been a great delay and neglect on its part to put its claim of right in force. It is a well settled rule in equity, that if a party is guilty of laches or unreasonable delay in the enforcement of his right, he thereby forfeits his claim to equitable relief.” (Citing cases.) “Equity regards diligence as one of its important elements, and it discourages laches as inequitable. Unreasonable delay to prosecute an existing claim is a bar to a bill in

“equity, especially when the parties cannot be restored to their original position, and injustice may be done. *Peabody vs. Flint*, 6 Allen. 52. * * * We cannot avoid the conclusion that the plaintiff slumbered on its rights, and has only been roused into activity by the discovery that the value of the property had in various ways become unexpectedly large.”

Royal Bank vs. Grand Junction, 125 Mass., 494.

In above opinion, *Brown vs. County*, 95 U. S., 160, is cited, which decides that, though there is a statute of limitations applicable, and which has not run, still if there is laches the bill will be dismissed on that inherent principle of equity. So in a later case, the Supreme Court of the United States say:

“Stale claims are never favored in equity, and where gross laches is shown, and unexplained acquiescence in the operation of an adverse right. Courts of Equity frequently treat the lapse of time, *even for a shorter period than the one specified in the statute of limitations*, as a presumptive bar to the claim.” (Citing cases).

Goddlen vs. Kimmell, 99 U. S., 201.

In other words the statute of limitations arbitrarily fixes a time beyond which the most equitable claim shall not be enforced. The doctrine of laches says that even within that time, under circumstances, the Court of Equity will not interfere.

Blanchard vs. Doering, 23 Wis., 200, is another late case where this doctrine of laches was applied to a case where the court below had granted the injunction in a water case, and it is held that “long acquiescence is a bar to the remedy, and especially where it will be productive of hardship and oppression, or public or private mischief.” And cases were cited with approval where after a delay of four or five years, in water cases, the court dismissed the bill and turned the plaintiff over to his remedy at law, on the ground of acquiescence. Especially the case of

Sheldon vs. Rockwell, 9 Wis., 161, where a bill like this was dismissed, the Court saying:

“There is no doubt of the power of a Court of Equity to interfere by injunction to prohibit injuries occasioned by the back flowage of water in cases like the present. But in this proceeding there is one feature

“which we consider conclusive upon the rights of the
 “parties. It is the length of time which the defend-
 “ant permitted to pass after the erection of the dam in
 “question, and before the commencement of his suit
 “to restrain its construction or continuance. Thirteen
 “years passed between the building of the dam and
 “the institution of this action. The dam was begun
 “in August, 1837; this suit in August, 1856. In less
 “than twelve months more his remedy at law, by action
 “on the case, would have been barred. In the mean
 “time the dam was four times destroyed by floods, and
 “as often rebuilt by the defendants. During all the
 “time the plaintiff resided in the immediate neighbor-
 “hood and upon the premises for the injury to which
 “he now complains. With the exception of a verbal
 “notice to the defendants, at the time the dam was orig-
 “inally built, that its erection would be an infringe-
 “ment of his rights, he remained during all the time
 “a calm and constant observer of every step taken and
 “every movement made by the defendants, without one
 “word of complaint or warning. He commenced no
 “suit, consulted no attorney. No fraud, misrepresen-
 “tation or unfair dealing on the part of the defendants
 “is alleged. No accident, mistake or excuse for
 “delay on his part is set up. After nineteen years
 “of profound sleep, he seems suddenly to have awak-
 “ened to a sense of his position, and finding the dam
 “for a fifth time swept away by high water, and
 “defendants engaged in replacing it the same as be-
 “fore, he asked of a Court of Equity that they be re-
 “strained. Could a more proposterous proposition be
 “urged? A statement of these facts constitute the
 “strongest refutation of his claim for relief. The
 “granting or refusal of injunctions rests in the sound
 “judgment of the Court. They are never granted when
 “they are against good conscience or productive of
 “hardship, oppression, injustice, or public or private
 “mischief. The plaintiff, by his silence and acquies-
 “cence, has invited and encouraged the defendants to
 “expend their time and means in the construction and
 “repairing of the dam and the mills and machinery
 “used in connection with it. In them they have a large
 “pecuniary interest, and though they may have erected
 “them for purposes of private speculation, they are,
 “nevertheless, entitled to the consideration of the
 “Court. The public have a large interest in the im-
 “provements created by their capital and enterprise.
 “During the greater portion of the time since the erec-

“tion of the dam in question the building and maintain-
 “ing of dams and mills have been so much regarded as
 “matters of public concern that they have been and now
 “are fostered and protected by statutory laws. For a
 “Court now to interfere and say to the defendants that
 “they shall not rebuild their dam because, by an acci-
 “dent against which it was impossible for them to guard,
 “it has been destroyed, and their mills and machinery
 “thereby rendered temporarily useless, would be an act
 “of gross oppression and injustice.

“The Court lends its aid only to the vigilant, active
 “and faithful. This tardy application must be regarded
 “as made in bad faith. After his gross and unparalleled
 “negligence, the plaintiff can have no standing in Court
 “for the purpose of asking the relief here sought. Un-
 “reasonable delay and mere lapse of time, independently
 “of any Statute of Limitations, constitute a defense in a
 “Court of *Equity*. This doctrine is very ancient, and
 “established by a great number of decisions.

“In the leading case of *Smith vs. Clay*, Ambler, 645,
 “Lord Camden said: ‘A Court of Equity which is never
 “active in relief against conscience or public conven-
 “ience, has always refused its aid to stale demands
 “where the party has slept upon his rights and acqui-
 “esced for a great length of time. Nothing can call
 “forth this Court into activity but conscience, good
 “faith and reasonable diligence. Where these are
 “wanting the Court is passive and does nothing.
 “Laches and neglect are always discountenanced, and
 “therefore, from the beginning of the jurisdiction,
 “there was always a limitation to suits in this Court.’

“In *Knight vs. Taylor*, 1 Howard, U. S. Rep., 161, a
 “bill filed to adjust matters of account *which were not*
 “*barred by the Statute of Limitations*, was dismissed for
 “want of reasonable diligence. Taney, C. J., adopts
 “the language of Lord Campbell, and adds: ‘It is not
 “merely on presumption of payment, or in analogy to
 “the Statute of Limitations, that a Court of Chancery
 “refuses to lend its aid to stale demands.’

“In *Haight vs. The Proprietors of the Morris Aqueduct*,
 “4 Wash., C. C. R., 601, the defendants having had the
 “adverse possession for twenty years of certain water
 “which had previously flowed into plaintiffs’ mill-pond,
 “which they had used during that period by means of
 “an aqueduct for supplying water to the town of Mor-
 “ristown, suffered it to go into disuse in consequence
 “of a decay of the logs of the aqueduct for three years
 “during which the water again flowed into the plaint-

"iffs' pond. Upon the defendants' commencing the
 "reconstruction of the aqueduct the plaintiffs applied
 "for an injunction, which was refused on the ground
 "that twenty years' possession vested a complete title
 "to the water in the defendants. In passing upon the
 "case *Washington, J.*, says:

"The next objection to the interference of this
 "Court, which I consider to be insuperable, is the ac-
 "quiescence of those under whom the plaintiffs claim
 "in the construction of this aqueduct originally, and
 "in their subsequent enjoyment of the water by which
 "it was supplied, which circumstance, though unac-
 "companied by long possession, would be sufficient to
 "close the doors of a Court of Equity to this applica-
 "tion. In such a case the Court will not only refuse
 "to interfere in favor of the party who has thus acqui-
 "esced or been guilty of inexcusable negligence, but
 "will even grant injunctions to restrain actions brought
 "at law for the nuisance.

"Although the latter proposition may not be true,
 "the former is undoubtedly the law in such cases.

"In the case of the *Birmingham Canal Company vs.*
Lloyd, 18 Vesey, 515, the plaintiffs having permitted
 "the defendants to proceed for nearly two years, and to
 "expend a large sum of money in the erection of their
 "machinery, Lord Eldon refused an injunction for the
 "reason that the plaintiffs had not commenced their
 "opposition when they could have done so with jus-
 "tice.

"If in England two years of acquiescence defeats a
 "proceeding like the present, how much less delay
 "ought to suffice for that purpose in a newly settled
 "country like our own, whereby the rapidity of our
 "growth and enterprise a few months oftentimes de-
 "termines the destinies of our cities, villages and
 "places of business? The diligence required by the
 "law ought to be measured by the mischief which
 "would ensue from a want of it.

"The same principles will be found established in
 "the following English and American cases: *Bond vs.*
Hopkins, 1 Sch. & Lef., 413, 428; *Hovendon vs. Lord*
Armesley, 2 id., 607, 630 to 640; *Stackhouse vs. Boon-*
ston, 10 Ves., 466; *Beckford vs. Wade*, 17 Ves., 466,
 "467; *Chalmodeley vs. Clinton*, 2 Jac. & Walk., 1, 138
 "to 152; *Postlock vs. Gordon*, 1 Hare R., 594; *Vigors*
 "vs. *Pike* 8 Clarke & Fin., 650; *Decouche vs. Saventien*,
 "3 John C. R., 190; *Kane vs. Bloodgood*, 7 id., 93;
 "*Dexter vs. Arnold*, 3 Sum., 152; *Piatt vs. Vattier*, 9

“Peters, 405, 416, 417; *Sherwood vs. Sutton*, 5 Mason
 “R., 143, 145, 146; *Bowman vs. Wathen*, 1 How. U. S. R.,
 “189; *Gould vs. Gould*, 3 Story R., 516; and *Weller vs.*
 “*Smeaton*, 2 Cox Ch. R., 102.

* * * * *
 “The judgment of the Circuit Court is affirmed with
 “costs.”

Where in an action for flowing the water back upon mills in occupation of the plaintiffs, it was shown that defendants had omitted to assert their title, though knowing the premises belonged to them, and that plaintiffs had purchased them and were making valuable permanent improvements thereon, in the belief that they owned them. *Held*, That this silence—this omission to assert title—clearly constituted an estoppel, and that no evidence could do away with the force of it.

Brown vs. Bowen, 30 N. Y., 520.

Demurrer to bill sustained, P. C.—“The suit is
 “one in equity to enjoin and restrain the defend-
 “ants from further building or repairing a wing-
 “dam * * or in any way obstructing the natural
 “flow of the water of that river. * * * There
 “can be no doubt that the Act of 1848 authorized
 “Smith and his associates to construct a dam across
 “Rock River, * * providing the dam was so con-
 “structed as not to flow any lands nor interfere with
 “any privileges they did not own. * * * The dam,
 “to this extent, then, is lawful. * * * And there
 “can be as little doubt that in no possible view could
 “the Legislature authorize them to overflow and injure
 “the lands of others without making them just com-
 “pensation. Were this an action at law brought to
 “recover damages for the injuries which the plaintiffs
 “had sustained * * * we would have no difficulty
 “in sustaining the suit. But it is not. The suit has a
 “double aspect—both to restrain the defendants from
 “making repairs upon a dam already erected, and to
 “have the dam declared a nuisance and abated as such.
 “Do the plaintiffs show themselves entitled to such
 “relief from a Court of Equity? Or do they show such
 “an acquiescence in the original construction of this
 “dam and raceway, and in the subsequent use and en-
 “joyment of the water power thereby created, as to
 “close a Court of Equity to this application? * * *
 “It appears that the plaintiffs owned the lands overflow-

“ed in 1848. At that time Smith and his associates
 “commenced erecting the dam and raceway under the
 “authority conferred by the original charter. The
 “plaintiffs saw this dam and raceway erected, and re-
 “built or repaired from time to time. Valuable im-
 “provements were made along this raceway upon the
 “strength of the right to draw and use water from the
 “dam. The plaintiffs acquiesced in this state of things
 “for *several years*; and now ought they to be permitted
 “to come into a *Court of Equity* and obtain an injunction
 “restraining the defendants from further building or
 “reparing the dam, when such valuable improvements
 “have been made upon the expectation of enjoying the
 “privilege of getting water from the dam? It appears
 “to us not. The case falls fully within the principle
 “and reason of the rule laid down in *Sheldon vs. Rock-*
well, 9 Wis., 166. In that case it was said that the
 “granting or refusing an injunction rested in the sound
 “discretion of the Court, and that one was never granted
 “when it was against good conscience or would be pro-
 “ductive of hardship or private or public mischief.
 “There can be no doubt about the correctness of this
 “doctrine. If the plaintiffs have sustained any dam-
 “age in consequence of the flowage of their land, they
 “have their common-law remedy.”

Cobb vs. Smith, 16 Wis., 696.

“If a party having a right stands by and sees an-
 “other dealing with the property in a manner inconsis-
 “tent with that right, and makes no objection while the
 “act is in progress, he cannot afterwards complain.”

Lord Cottenham.

Blake vs. Guild, 2 Phillips, 111.

“Long continued acquiescence in the erection of
 “works which it is afterwards sought to enjoin as a
 “nuisance, may constitute a bar to relief in equity.
 “And it may be asserted as a rule that long delay
 “upon the part of the plaintiff who seeks to enjoin a
 “nuisance will afford sufficient reason for refusing to
 “him relief in equity. The rule is extended even fur-
 “ther, and it has been held that one party may so
 “encourage another in the erection of what he after-
 “wards complains of as a nuisance, as to give the ad-
 “verse party a right to invoke the aid of equity to re-
 “strain proceedings at law for the recovery of dam-
 “ages,” etc.

High, §756.

"So it is requisite that a complainant seeking the aid of a Court of Equity by injunction shall not have been guilty of laches or delay in the assertion of his rights, for, while delay may not amount to proof of acquiescence in the wrong for which he seeks redress, it may yet suffice to prevent his obtaining relief by injunction."

High, §7.

A. D. 1875. Bill to enjoin use of trade-mark. Dismissed for laches. The Court say the plaintiff knew of the infringement in January, 1874, "and under these circumstances, had the plaintiffs applied in proper time, I am not prepared to say that they would not have been entitled to an injunction. On the contrary, as at present advised, I think that they would have been." But as they delayed the application until August of the same year, some seven months, the Court holds that after such delay it could not be said it would be according to the practice of a Court of Equity to interfere.

Estcourt vs. Estcourt Co., L. R. 10, Ch. Ap. 279.

"There is no principle better established in this Court, nor one founded on more solid considerations of equity and public utility, than that which declares that if one man knowingly, though he does it passively, by looking on, suffers another to purchase and expend money on land under an erroneous impression of title, *without making known his claim*, he shall not afterwards be permitted to exercise his legal right against such person. It would be an act of fraud and injustice, and his conscience is bound by this equitable estoppel. *Qui tacet, consentire videtur. Qui potest et debet vetare, jubet.*"

Wendell vs. Van Rensselaer, 1 Johns., Ch. 353.

In *Ware vs. Regents*, 3 DeGex and Jones, 230, where an injunction was sought to restrain a nuisance by flooding, etc. The bill was dismissed by the Vice-Chancellor on the ground that the complainant must be left to his remedy at law. The Lord Chancellor, in affirming the decision below, said: "The plaintiff was not very urgent in his complaints, nor was he very active in his measures for obtaining redress for any alleged injury, for * * he waits for a period of *one year and eight months*, and then files his bill." * * (p.

220). Again (p. 230): "If the plaintiff had come immediately after the flooding of his lands * * he might possibly have had some grounds to ask the Court to interfere for his protection, not merely against threatened mischief, but against mischief actually produced, with the means and opportunity of repetition. * * Now, upon the question whether I am to grant the injunction, I cannot avoid being influenced by the delay which has occurred in the institution of proceedings by the plaintiff, which, though not amounting to absolute proof of acquiescence, yet is calculated to throw considerable doubt upon the reality of his alleged injury, and compels me to weigh the amount of inconvenience which he will sustain by my refusal of this particular remedy against the serious consequences which must result to the company from an order which will oblige them to alter the state and condition of their works, etc."

In *Goodwin vs. Cin., etc.*, 18 Ohio St., 179, a delay of about two years to apply to equity for relief against a nuisance was held such laches as to bar relief *at the hearing*. The defendant had expended about \$1,000,000, and the plaintiff had stood silently by. The Court says the omission to sue in due time constitutes "an implied assent;" that "he who will not speak when he *should*, will not be allowed to speak when he *would*. He must have shown himself prompt and vigilant in the assertion of his rights. * * It will not do for him to wait until the mischief of which he complains has been accomplished, fortunes expended, and great public interests created. If he does, he must be held to have acquiesced in the change, or to content himself *with some other form of remedy*."

In another case, the Supreme Court of Ohio say of a plaintiff: "Remaining inactive and silent until his swamp lands were drained by a ditch of nearly a mile in length, he then, for the first time, asks the interposition of a Court of Equity. We think he comes too late."

"The case of *Wiggin vs. The Mayor, etc.*, 9 Paige, 24, was a case in which an injunction was sought to restrain a city corporation from the enforcement of an assessment levied to pay for the improvement of a street; and the remarks of Chancellor Walworth in that case are very pertinent here. He says: "There is another substantial reason why this Court

“should not interfere in this case by injunction, * *
 “but should leave the complainant, if he has any, to his
 “remedy at law. The proceedings for the making of
 “the improvements were commenced nearly five years
 “since, and the complainant had waited until the
 “improvement had actually been completed several
 “months before he or his agent attempted to interfere.”

Kellogg vs. Ely, 15 Ohio St., 67.

In *Parrott vs. Palmer*, 3 Myl. & K., 639, the right of plaintiff, not merely to provisional, but to any equitable relief, even at the hearing, was denied for laches.

P. C.—“If there be anything well established in this Court, it is that a person who lies by while he sees another person expend his capital and bestow his labor upon any work, without giving to that person notice, is attempting to interrupt him—one who thus acquiesces in proceedings inconsistent with his own claims—when he comes to enforce those claims in this Court shall in vain ask for its interposition by an injunction, of which the effect would be to render all the expense useless which he voluntarily suffered to be incurred.”

“It is a maxim that *vigilantibus non dormientibus æquitas subvenit*—the meaning of which is, that equity discountenances laches, and independently of any statute of limitations, has always refused to interfere where there has been gross laches in prosecuting rights, or long and unreasonable acquiescence in the assertion of adverse rights. * * Under such circumstances it would, in many cases, be impossible to interfere without doing injustice to third persons who had acquired interests in the property during the intervening period. * * * In general, nothing can call forth a Court of Equity into activity but conscience, good faith, and personal diligence.”—Smith’s Manual of Equity, 19.

The distinction between cases where laches is alleged as a reason why a complainant shall not have equitable relief, and where it is asserted as a bar to an action at law, or as giving the party guilty of the nuisance himself a standing as complainant in equity, to prevent the party injured availing himself of his legal remedies, is patent, and is well illustrated by the opinion of Lord John Romilly, cited by Wood as “a masterly opinion

“which commends itself as an authority because of the
 “cogency of its reasoning and the soundness of its
 “doctrine.” The case is *Bankart vs. Houghton*, 27
 Beavan, 428. There Houghton had obtained a verdict
 at law against Bankart for a nuisance, and thereupon
 Bankart filed his bill for an injunction against Hough-
 ton to restrain the enforcement of the judgment at
 law, on the ground of acquiescence in the nuisance.
 The evidence rather established a passive non-interfer-
 ence than a strict acquiescence. P. C.—“There are
 “two questions to be considered in this case. First,
 “the extent of acquiescence alleged and proved; and
 “second, the legal consequence of such acquiescence as
 “is proved. On the first, as to the acquiescence, this
 “is proved, and indeed not contested by the defendant.
 “First, that the termor and the defendant, when he
 “took the farm, were well aware of the extent of the
 “works, and that the tenants who assigned the lease to
 “the defendant had seen them while they were being
 “erected, and did not take any steps to prevent the
 “erection. These facts are very material for some pur-
 “poses, and *if the present case were reversed*, and the de-
 “fendant was here seeking to restrain the plaintiffs * *
 “I should, on the facts, deem that the defendant was
 “debarred from any right to obtain any such relief as
 “is afforded by an injunction, and that he must be left
 “to his remedy at law.” In the text Wood says: “If
 “the dam itself is so erected as to produce damage to
 “the lands of supra-riparian owners, it is a nuisance,
 “and parties injured thereby are not estopped from a
 “recovery for injuries therefor upon the ground of ac-
 “quiescence in its construction, unless it could reason-
 “ably have been ascertained or foreseen at the time of
 “its erection that it would produce the ill results com-
 “plained of. In this respect *it stands precisely upon the*
 “*same grounds as any other nuisance*, and the rule in ref-
 “erence to acquiescence therein, and estoppel by reason
 “of acquiescence, is that when a person acquiesces in
 “the erection or maintenance of anything that is a nu-
 “sance *per se*, or that he might reasonably have fore-
 “seen could become a nuisance, a *Court of Equity* will
 “not interfere by injunction to relieve him from the
 “effects thereof, but his remedy at law remains.” etc.
 Wood on Nuisances, §360.

“And now suits in equity are expressly confined to
 “the period allowed for actions at law. * * * But
 “though this is the limit, yet the Act does not interfere

“with any rule or jurisdiction of Courts of Equity in
 “refusing relief, on the ground of acquiescence or
 “otherwise, to any person whose right to bring a suit
 “may not be barred by the Act. *The time may be short-
 “ened, it cannot be lengthened,*”

1 Sugden, V. & P. (254), 389.

“Parties who would have had the clearest title to
 “relief, had they come in reasonable time, may deprive
 “themselves of this *equity* by a delay which falls short
 “of the period fixed by the statutes.”

Ib., p. 388.

2 Spence, Eq. Jur., 61, 62.

So our Statutes of Limitation, though binding in
 Courts of Equity, fall within the rule above quoted from
 Sugden. In a late New York case, the Court say: “It
 “is not claimed that there is a statute of limitations
 “within which the case falls. The defense of the re-
 “spondent rests upon the *laches* of the petitioner—that
 “is to say, upon his slackness or negligence in prose-
 “cuting his right. The doctrine which is shortly indi-
 “cated by that word is that, for the peace of society,
 “a Court will refuse to interfere, though there is no
 “Statute of Limitations applicable, yet there has been
 “gross neglect in prosecuting rights, or long and unrea-
 “sonable acquiescence in the assertion of adverse
 “rights. A Court of Equity is never active against
 “public convenience, and refuses its aid where a party
 “has slept upon his right. (*Smith vs. Clay*, Ambler,
 “645.) What length of neglect to enforce a right
 “will bring a case under the operation of this rule may
 “not be abstractedly determined. Regard must be
 “had to all the circumstances of the case, especially
 “to such as show a change in property or the relative
 “position of parties or persons interested or affected.
 “In one case a delay of fourteen months was held to be
 “fatal (*McMurray vs. Noyes*, 72 N. Y., 523); because in
 “that time the value of certain property had been so
 “changed by accidental causes as that the situation of
 “the parties was materially affected. In another case
 “a delay of four years was held fatal. * * * It is
 “said that this proceeding is analagous to a bill to re-
 “move a cloud upon title, and it is insisted that no
 “*laches* of the owner will defeat his claim for relief.
 “The case of *Miner vs. Beckman* (50 N. Y., 337) is cited.
 “That case does not in its facts, or in the reasoning of
 “the opinion, touch the doctrine that the right to relief

“may be lost by the *laches* of the protestant. The judgment there was put upon the ground that the right to sue had accrued within ten years of the commencement of the action; that the Statute of Limitations applicable to the case was that of ten years. The question raised, discussed and determined was whether the action was barred by the statute. No application of the equitable doctrine we have named was sought, nor was it pronounced impossible.”
Matter of Lord, 78 N. Y., 112.

So, in a late English work it is said that “the general tendency of *modern* decisions is to increasingly discourage stale demands.”
 1 Dart., V. & P., 41.

It is not necessary for us to go, in this case, to the length of contending that it is always *indispensable* first to establish title at law before coming to equity for an injunction, nor that mere lapse of time, short of the Statute of Limitations, will bar the *equitable* remedy. But only that under circumstances of delay, with knowledge, great expenditure, large interests affecting whole communities, absence of real loss, injury or damage, the Chancellor may refuse equitable relief. And we have made the lengthy extracts *supra*, to show fully the course and practice of equity in *similar* cases, for all the authorities agree that there is no general, rigid rule, and could not be without perversion of the principles of equitable as distinguished from common law jurisprudence.

“An injunction will not be granted when it will operate inequitably or contrary to the real justice of the case.”

T. & B., etc. vs. B. H., etc., 86 N. Y., 125-6, A. D. 1881.

The allegation and proof that defendants were insolvent, essential to authorize the equitable relief prayed for *under the circumstances of this case*.

Dunkart vs. Rinehart, 16 The Reporter, 243.

For the quotation from Pomeroy (App. pts and authorities, p. 428), only two cases are cited by the author, and neither of which sustains him.

In one of them the Court say: “An unlawful obstruction by the defendant of an ancient, though not very

“valuable light, has been established. On the other hand, this obstruction took place nearly six years before the bill was filed, under the very eyes of the plaintiffs, * * and the light does not appear to have been for any practicable purpose, missed or wanted since its obstruction. A bill for an injunction in such a case would, I think, before the passing of Lord Cairns’ Act, have been dismissed, and the plaintiffs would have been left to the remedy at law. Since that Act, if the bill were not dismissed, I should certainly agree with the Master of the Rolls in thinking the case one for an inquiry as to damages, and not for an injunction. * * I have come to the conclusion that the bill ought to be altogether dismissed, without prejudice to any *action* which the plaintiffs may be advised to bring,”

Gaunt vs. Fynney, L. R. 8, Ch. Ap. 14.

In the other case it is said that a *mere* delay of less than two years would not disentitle the plaintiff to equitable relief; that “the right asserted is a legal right. * * Such an action is subject to the Statute of Limitations, and * * the injunction is sought merely in aid of the legal right. In such case the injunction is * * a matter of course if the legal right be proved to exist. *In saying that I do not shut my eyes to the possible existence, in other cases, of a purely equitable defense, such as acquiescence, etc. But mere lapse of time, unaccompanied by anything else (and to that I confine my observations) has * * just as much effect, and no more, in barring for an injunction, as it has in barring an action for deceit.*”

Fullwood vs. Fullwood, L. R., 9 Ch. Div., 176.

Burden vs. Stein. if it decides anything more than that *mere* lapse of time short of the Statute of Limitation (and this seems to be its whole scope), will not be a bar in equity any more than at law, is in conflict with all the other authorities and with the well-settled and universally recognized principles of equity jurisdiction.

Shamleffer vs. Peerlus, 18 Kan., 32, does not deny the doctrine of laches. The decision is put on the expressed grounds that the plaintiff was a minor and therefore incapable of acquiescence, and that there was “*no pretense that she knew anything of the work, and that the defendant knew it had no right to divert.*” This is

the opposite of our case. Plaintiff here was capable, had knowledge, and defendants had the right to suppose that every citizen here has the right to divert unused waters on the public lands.

The citation (App. Pts. and Au., 427) of "6 Wait's A. & D., 208," must be a clerical mistake. We presume page 281 was intended. *That* says: "A complainant who asks the Court to restrain by injunction 'a threatened invasion of his rights must show * * that he has been guilty of no delay * * (p. 282). 'Where the damage is not serious, * * equity will not interfere, * * and if it appears that the removal of an obstruction *will still leave it impossible for the party claiming the right to it to derive any benefit from it*, a Court of Equity will not lend its aid to a removal" (p. 270). "The anomalous condition of the settlers and miners upon the public lands in California has induced the Courts of that State *to depart from the strict rules of the common law*, and to recognize priority of appropriation as a foundation of right to the use of running water."

Morrill vs. St. Anthony seems from the meagre report only to hold, as the syllabus says, "that mere delay does not work an *estoppel*." The decision and finding in the case were against the claim of laches and acquiescence, if any such defense was set up, and the Court above say the evidence justified that finding. What the circumstances were is not disclosed. The Court may have thought there were no equitable reasons, that defendants had no knowledge, that there were no great expenditures, etc., etc.

Dugan vs. Gittings controverts none of the cases we have cited on acquiescence and laches. It is like the others, that where the Statute of Limitations is alone relied on in equity, as at law, mere delay short of the statutory period will not suffice.

That we are correct in this estimate of the cases cited by appellants is also shown by a later decision of one of the same Courts, rendered in A. D. 1879, and directly in point here. There the delay was less than two years, but the Court, in an able opinion, citing the authorities, apply the rule of equity, and hold that, having delayed so long, even after he had become fully acquainted with the consequences to him and his property of such diversion, he had no remedy *in equity*.

Thomas vs. Woodman, 23 Kansas, 217.

To the same point, we ask the particular attention of the Court to the late case of *Hough vs. Doylestown*, 4 Brewster Pa., 345, where the distinction between a preliminary and final injunction is taken, and on the final hearing the bill was dismissed, the Court summing up a full and able discussion of all the questions by saying: "*The law upon this point is well settled.* A plaintiff must show that he has not been guilty of any improper delay in applying for the injunction of the Court, not acquiescence in the sense of conferring a right upon another party, but acquiescence in the sense of depriving of the right of interference of a Court of Equity; and more especially he forfeits his right by laches, being cognizant of his rights, if he does not take those steps to assert them which are open to him, but lies by and suffers other parties to incur expenses and enter into engagements and contracts of a burdensome character."

The case of *Stockman vs. Riverside*, in this Court, is, if possible, still wider of the mark than the other citations of counsel. That was an action to quiet title, or a species of action under our Code where the legal rights, strictly speaking, are put in issue and determined—an action of ejectment upside down; no appeal to the extraordinary powers of equity. To have upheld the decision of the Court below would have been simply to have decided, on less potent grounds, the question of estoppel at law—left undecided in the case above quoted from Brewster. Again, there the estoppel was sought to be used as translativ of title to realty, not only as restricting the remedy to law. And your Honors say there is no authority that upon such facts an *estoppel* arises. (Citing cases on technical estoppel.)

G.

Rebuttal as to Channels was properly excluded.

Even if the appellants had confined themselves in their opening to prove generally a continuous stream or channel from the Calloway to their lands, it would not have been proper in rebuttal to show the existence of a channel at specific points where we disproved their opening case by showing there was none. But they did not so confine themselves. On the contrary, in opening they attempted to prove and gave evidence on the existence of the channel at *every point* throughout the whole distance. This their counsel assert positively that they did. We quote from the record:

"Mr. Houghton—We put on our witnesses and traced the Slough down. We didn't take them across at two or three different points, and then asked them if there was a continuous Slough. We traced the Slough down, and after following the Slough continuously, we then asked them whether or not there was a continuous channel.

"Mr. Haggin—Do you mean that you traced with the witnesses that Slough from one end to the other before you asked such a question?

"Mr. Houghton—I mean to say that we did." (Trans. IV., fols. 645-6.)

McCray states positively, that in 1877 and 1878, pursuant to instructions, *he meandered* THE WHOLE STREAM—whatever channel there was. (Trans. II., fols. 805-6.) He also says that in 1881 he *traced out those* channels, shown on map 2, which he had not previously meandered; and as to those shown on map 3, that he actually meandered them, and measured or estimated their various widths and depths as he went along.

See testimony of McCray, Trans. II., folios 376, 378, 379, 382 to 384, 386-7, 396 to 399, 408, 424, 426-7, 433 to 440, 440 to 452, 453, 459, 817, 837, 846 to 849, 852, 855, 1619, *et seq.* 1649, 1651.

See also testimony of Crocker, folios 494, 501-2, 504, 506-7, 515 to 517, 520, 576, 685; and of Still, folio 770; and of Tracy, folio 965; and of Lewis, folio 1055; and of Clarke, folios 1170-1-2, 1173-4; and of Racine,

folios 1257-8; and of Dover, 1262, 1265-6; and of Gibbs, folios 1407, 1410; and of Norton, folios 1671, *et seq.*, 1679, 1681, 1683-4-5, 1698; and of Wible, folios 1765 to 1772, 1773 to 1778, 1780 to 1783, 1785, 1787, 1788, 1791, 1794; and of Epperly, folios 2171, 2173, 2175, 2178, 2181 to 2183, 2184, 2186, 2187 to 2228.

They say it was error to refuse them the right in rebuttal to go again into the question of the amount of water in the river, and claim the right to do so as disproving our evidence of evaporation. But here again the evidence was cumulative. In their opening they went into testimony on this very point of the quantity of water, and one of their witnesses, who testified before they rested, testified on this very question of evaporation. They proved by many witnesses that the water would flow into Buena Vista Lake until it was full, and then turn north—that is that it did not all evaporate in the lake, *e. g.* Crocker, Trans. II, fol. 526-7. Our proof of evaporation only meets that, and for them to prove over again the quantity in the river above is only to cumulate their original case. Crocker testified (Trans. II, fol. 725) as to amount of water in Kern River in ordinary seasons, and (fol. 751) as to its condition in 1880; and Tracy testified (fols. 1023-4) to the condition of the river in 1881 and compared its then condition to that of former years; and P. S. Jewett as to amount at the Calloway in 1881 (fols. 1454, 1460-1); and Davidson (fols. 1473-78, 1480) testified to an exact measurement of the water in the river; Wible (fol. 1827) to amount of water in the river at the Calloway in 1881. At folio 1931 he testified as to lake getting lower by evaporation without overflowing—the very point on which they say they were not allowed to give further evidence in rebuttal. At folios 2117 to 2118 he testified to quantity flowing down river as compared with that flowing into the Calloway. This, in connection with Robert's testimony (Trans. II, p. 69 *et seq.*), shows that the plaintiffs in opening went fully into this very specific question of the amount of water in the river. At folios 274-282 Roberts testified as to quantity of water in the Calloway in 1876, April, 1877, May, 1877, August, 1877, 1878, 1879, 1880, and 1881, up to time of trial; as to depth of water in canal at those dates, and as to width of head-gate ever since 1876; that the canal did not take all the water of the river at any time since 1876; gives grade of canal and its slope and widths. Farman (fol. 2135) testified as to amount

of water in river; and Willow (fols. 2347 to 2349) does the same. At folio 1028, Trans. III, appellants prove by Mendell that in 1873 he measured the river about ten miles above Bakersfield and found it about 2,500 cubic feet per second; and at folios 1088-1091, by Schuyler the amount of water at Rio Bravo in January, 1879, was about 500 cubic feet per second; at folio 1106, that he measured the water of the river at the mouth of cañon, January, 1879, and found it 389 cubic feet per second.

The plaintiffs also in opening went into the question of our appropriation, and called Mr. Carr (Trans. II, fols. 2152-2170), who testified at length in regard to the construction of and use of water by the Calloway from 1875 to 1881; when Calloway and his associates conveyed that property to defendant, etc.

For the other points in the case we refer your Honors, and counsel, to the Brief of Messrs. Flournoy, Mhoon & Flournoy, of counsel for respondent, already filed.

Respectfully submitted,

LOUIS T. HAGGIN,
Attorney for Respondent.

GARBER, THORNTON & BISHOP,
FLOURNOY, MHOON & FLOURNOY,
Of Counsel.

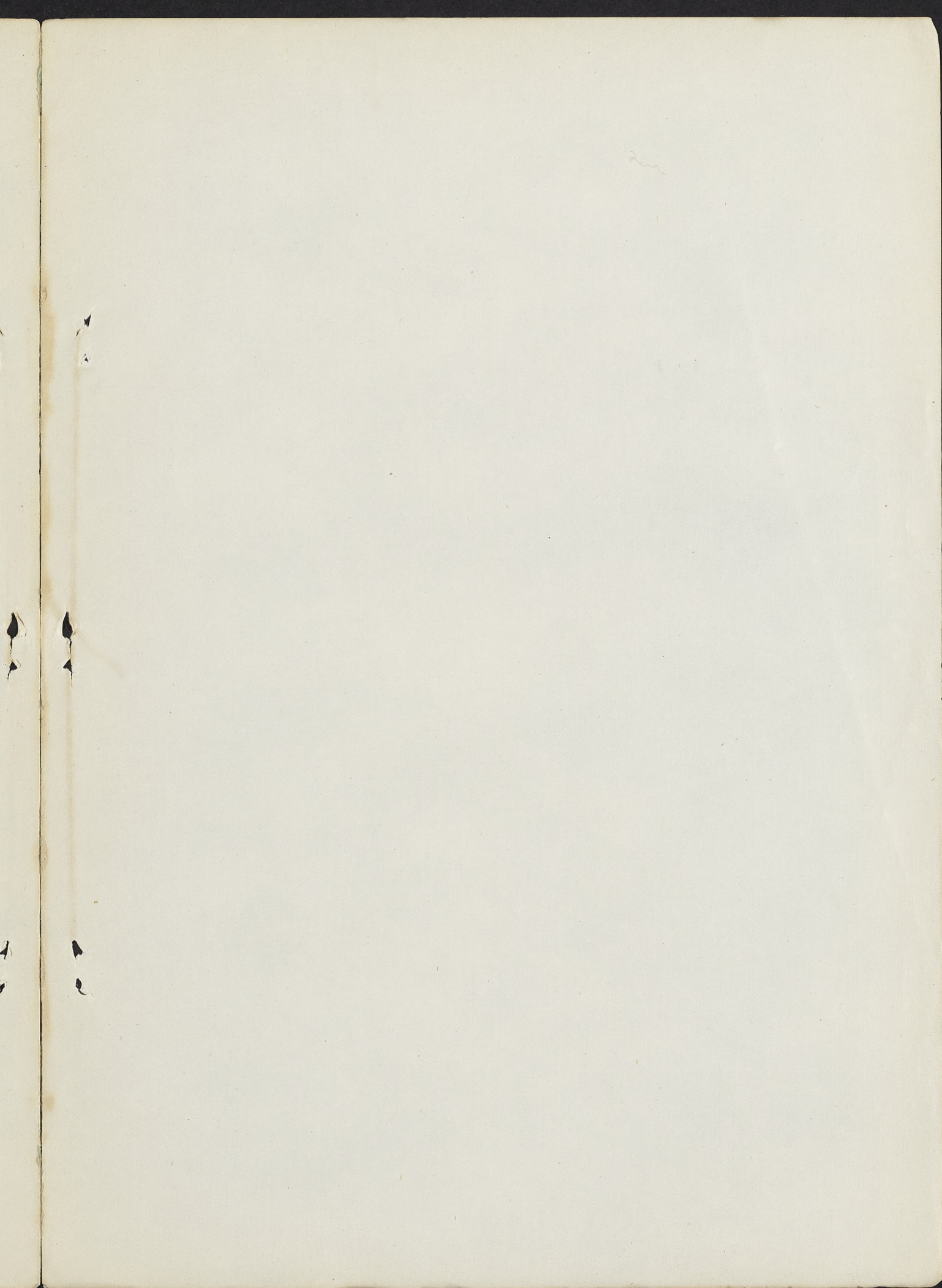
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 and is therefore not fit for drinking.
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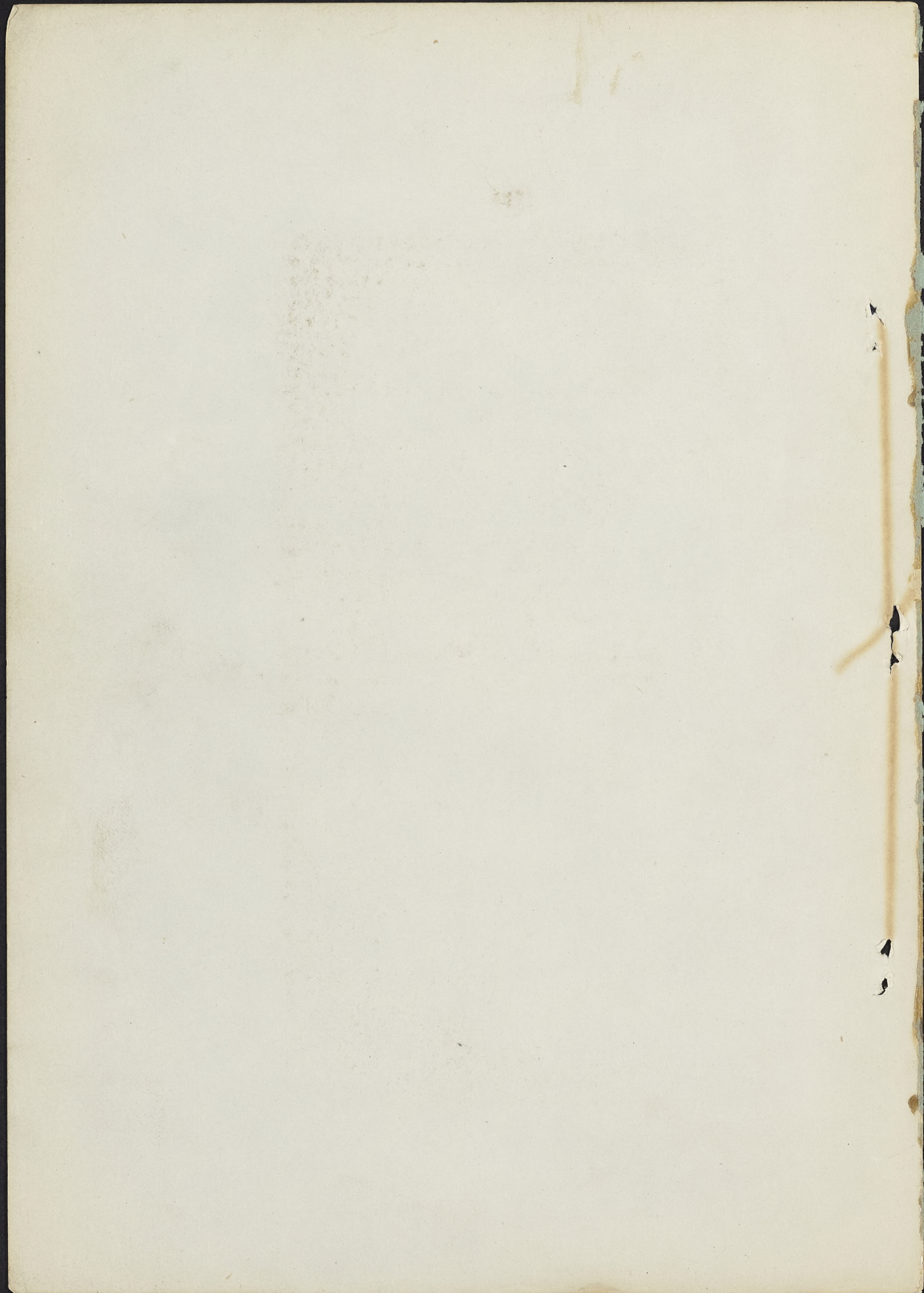
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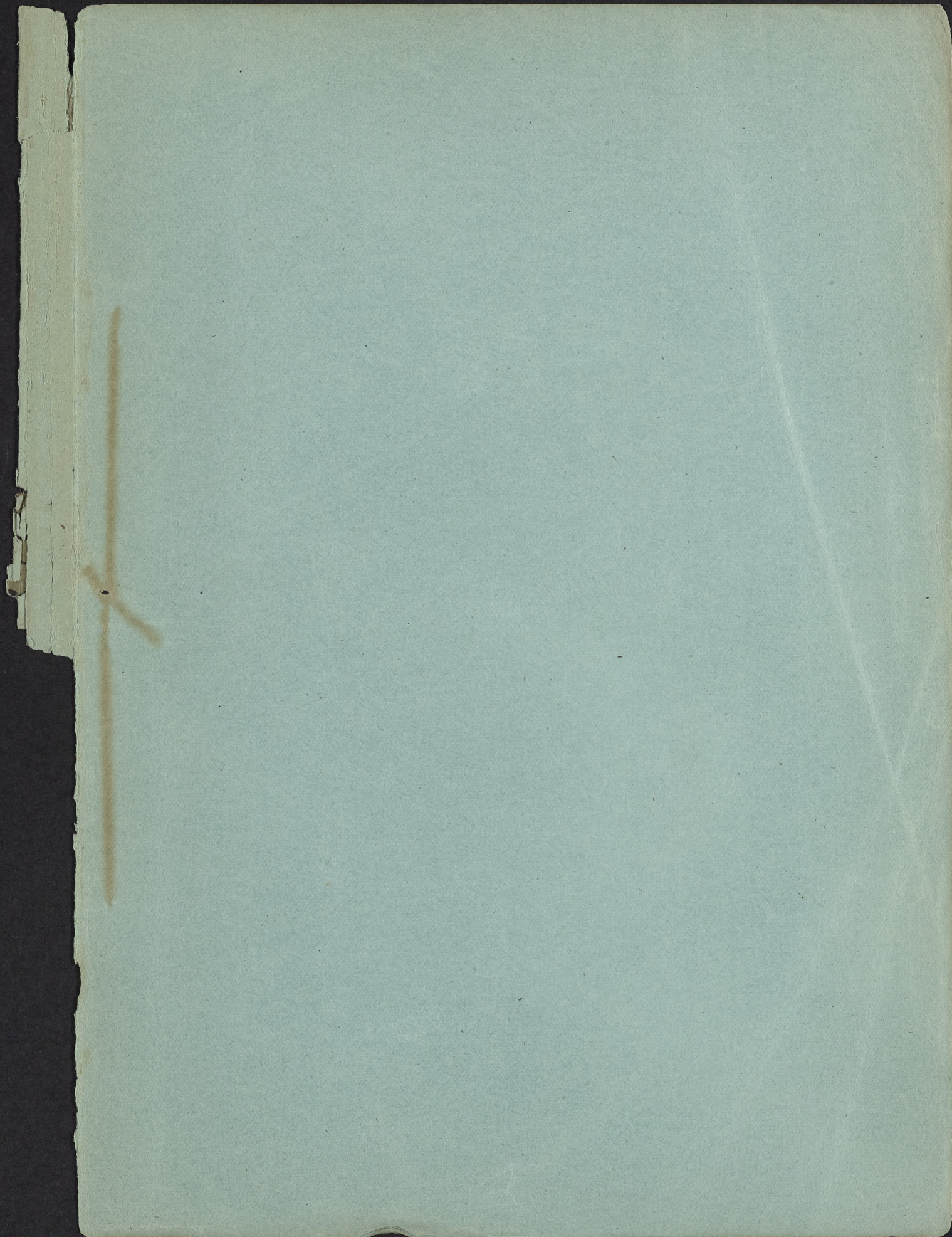
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Service of the within Brief, by copy, admitted
this Sixth day of November, A. D., 1883.

Stetson & Houghton
Attorneys for Appellants.

885